Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-493

WALTER RAYMOND WHITE,
Petitioner,
vs.
STATE OF INDIANA,
Respondent.

~~STATE OF INDIANA, *EX REL.*~~
WALTER RAYMOND WHITE,
Petitioner,
vs.
THE MARION SUPERIOR COURT, CRIMINAL DIVISION, NO. 3, and THE HONORABLE CHARLES C. DAUGHERTY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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THE HONORABLE CHARLES C. DAUGHERTY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered on June 27, 1979 in the action titled State of Indiana Ex. Rel. Walter Raymond White, Relator, v. The Marion Superior Court, Criminal Division No. 3, and The Honorable Charles C. Daugherty, Respondents, which was an original action filed by Petitioner in the Supreme Court of Indiana.

Petitioner's original action sought a writ of mandate and writ of prohibition, compelling the trial court to dismiss the criminal information filed against Petitioner and to discharge Petitioner on double jeopardy grounds in the action titled State of Indiana vs. Walter Raymond White, presently pending in the Marion Superior Court, Criminal Division, No. 3, Indianapolis, Marion County, Indiana. The judgment of the Supreme Court of Indiana has denied Petitioner's original action for writs of mandate and prohibition, and Petitioner will be subjected to a second trial in the pending trial court proceeding.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 391 N.E.2d 596 and is not yet reported in the official Indiana Reports. A copy of the opinion is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Indiana was made and entered on June 27, 1979, consisting of the opinion of the Supreme Court of Indiana in an original action, denying the petition of Walter Raymond White for a writ of mandate and prohibition. A copy of the opinion is appended hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).[1]

QUESTION PRESENTED FOR REVIEW

Whether a second trial of Petitioner violates his constitutional right against double jeopardy guaranteed by

[1] In *Harris v. Washington*, 404 U.S. 55, 92 S.Ct. 183 (1971) this Court held that a state Supreme Court's rejection of an accused's pretrial plea of former jeopardy constitutes a "final" order for purposes of invoking this Court's jurisdiction under 28 U.S.C. §1257.

the Fifth Amendment, and made applicable to the States through the Fourteenth Amendment, where the trial court *sua sponte* declared a mistrial of Petitioner's first trial, over objection of Petitioner, because a physician called by the State refused to answer certain questions propounded by the trial court and was held in direct contempt of court in the presence of the jury, and where the trial court stated that the physician's refusal to answer such questions deprived the State of an important witness because of the adverse affect on the credibility of the State's witness.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

The constitutional provisions, statutory provisions, and rules of procedure involved are set forth in the appendix.

They are:

(1) The Fifth Amendment to the Constitution of the United States, appearing in Volume 1, United States Code, Page XLVIII;

(2) The Fourteenth Amendment to the Constitution of the United States, appearing in Volume 1, United States Code, Page LII;

(3) Article 1, Section 14 of the Constitution of the State of Indiana, appearing in Constitutions, Burns Indiana Statutes Annotated, Code Edition, page 55;

(4) The statute under which Petitioner was charged, Indiana Code 35-42-1-1(1), appearing in Title 35, Book 2, Burns Indiana Statutes Annotated, Code Edition (1979 Replacement), page 123;

(5) The statute under which Petitioner filed his motion to dismiss and for discharge, Indiana Code 35-3.1-1-4(a)(5), appearing in Title 35, Book 1, Burns Indiana Statutes Annotated, Code Edition (1979 Replacement), pages 258-59;

(6) The statute upon which Petitioner based, in part, his motion to dismiss and for discharge, Indiana Code 35-41-4-3, appearing in Title 35, Book 2, Burns Indiana Statutes Annotated, Code Edition (1979 Replacement), pages 105-06;

(7) The statutes under which Petitioner brought an Original Action in the Supreme Court of Indiana for a writ of mandate and writ of prohibition, Indiana Code 34-1-58-1, 34-1-58-2, and 34-1-58-6, appearing in Title 34, Burns Indiana Statutes Annotated, Code Edition, pages 536, 548 and 561, respectively;

(8) Indiana Rules of Appellate Procedure, Rule 4(B)(5), under which Petitioner sought to appeal the denial of his motion to dismiss by way of interlocutory appeal to the Indiana Court of Appeals, appearing in Court Rules, Book 2, Burns Indiana Statutes Annotated, Code Edition, pages 4, 5 and 6 (1979 Cumulative Pocket Supplement);

(9) Indiana Rules of Procedure for Original Actions including writs of mandate and prohibition, appearing in Court Rules, Book 2, Burns Indiana Statutes Annotated, Code Edition, pages 586-87.

STATEMENT OF THE CASE

On January 12, 1978, Petitioner was charged by information with two counts of murder. Both counts charged violations of Indiana Code 35-42-1-1(1). (A. p. A-16)

Petitioner's trial began on March 12, 1979, when a twelve-member jury was sworn. (A. p. A-19) Thereafter, ten witnesses testified on behalf of the State during three days of trial. (A. p. A-20)

On March 13, 1979, the State called its tenth witness, Josefino C. Aguilar, M.D., a deputy coroner who had performed autopsies on the bodies of the two alleged

victims. (R. p. 174, 184, 219) The State concluded its direct examination of Dr. Aguilar, and the court then asked the witness whether he had an opinion as to what caused the wounds on one of the victims. (R. p. 200, 202) Dr. Aguilar stated that he refused to answer the question because it was beyond his capacity as a witness in the case, to which the court responded: "Okay, all right, drop it." (R. p. 202)

The State then asked some omitted questions on direct examination of Dr. Aguilar, and Petitioner's counsel proceeded with cross-examination. (R. p. 203, 205) Petitioner's counsel asked the doctor his opinion as to what caused the wounds, and the doctor refused to give his opinion. (R. p. 206) The doctor also refused to answer defense counsel's question as to the meaning of "milligrams per deciliter", and Petitioner's counsel asked the court to direct the witness to answer. (R. p. 209) The trial judge responded that he thought the doctor could refuse to answer if he gave his grounds and instructed Petitioner's counsel to ask his next question. (R. p. 209-11) Thereafter, Dr. Aguilar refused to answer two other questions propounded by counsel for Petitioner on cross-examination. (R. p. 213-14) At the beginning of the third day of trial, March 14, 1979, Petitioner filed a motion for mistrial based upon the court's preliminary instruction No. 2A which concerned the burden of proof on insanity. (R. p. 100-01) Petitioner had made no objection to the preliminary instruction at the time it was given. The court immediately overruled Petitioner's motion for mistrial. (R. p. 103) The trial then resumed with the State calling Dr. Aguilar to testify for redirect examination. (R. p. 103, 216-17) All of the transcript of the proceedings of the third day of trial is contained in the appendix. (A. p. A-21-30)

During the State's redirect examination, the court asked Dr. Aguilar what caused the wound on one of the victims, and Dr. Aguilar refused to answer the question. (A. p. A-23) The court ordered Dr. Aguilar to answer the question, and

Dr. Aguilar did not respond. (A. p. A-24) After finding the doctor in direct contempt of court, and after giving the doctor the opportunity to purge himself (A. p. A-25), the court found Dr. Aguilar in direct contempt of court, levied a fine and sentenced Dr. Aguilar to five days in jail, all in the presence of the jury. (A. p. A-28)

The Court then directed the Sheriff to take Dr. Aguilar from the courtroom, declared a mistrial and discharged the jury under the following circumstances:

"Court: Sheriff, will you take the doctor?

"DOCTOR AGUILAR LEAVES OPEN COURT ACCOMPANIED BY DEPUTY SHERIFF

"Court: This is in the record?

"Reporter Hatfield: Yes, sir.

"Court: If there is to be any appeal, or contesting the Court's decision the Court has the right to direct the trial of a case. This is a very serious multiple murder proceeding, and, we have been in trial here, we're going into the third day, and, we're not going to permit the ends of justice to be frustrated by Dr. Aguilar who apparently feels that every time he opens his mouth, he's supposed to be paid for it. Now, I understand that the Coroner has a contract with Wishard Hospital whereby the Coroner pays them $80,000.00 to perform autopsies, and, in return they are to provide doctors, and, expert testimony, isn't that right Miss Ressler?

"Ms. Ressler: Yes Judge.

"Court: And, he is a Deputy Coroner?

"Ms. Ressler: He has a duty to the public.

"Court: He has a duty to the public, just like we have a duty.

"Ms. Ressler: Absolutely.

"Court: So, this is in the record, he refused four times yesterday, to testify. It's the first time in my twenty years experience I've heard a doctor refuse to testify, and, there comes a point in proceedings where you've got to draw the line where the Court has to do what is in the best interest of the public. You can't allow a trial of this serious nature to become a circus, just because someone decides that they might or might not testify. As a result of this development in this case, because of the adverse effect it obviously would have on the Jury, and, the fact that it would deprive the State of an important witness, and, reflect on his credibility, the Court, at this time, is going to declare a mistrial in this case, set the submission of the cause aside, and, discharge the Jury, because I don't think that we can proceed fairly further in the matter. I don't think that I have any choice. I have never in a murder case, ever had anything like this to happen, and, for both sides to receive a fair trial, we cannot allow collateral disruptive influences to color the testimony that we've heard. I don't see any alternative, and, that's what I'm going to do at this time, so, we'll show that there has been a mistrial declared on the basis of Dr. Aguilar's performance, and, refusal to testify, and, submission of the cause is set aside, and, the Jury is discharged. We will reset this case for trial in the immediate future, at such time as Counsel for the State and, the Defendant can confer on it, and, start over again; I don't see any alternative.

"Mr. Hollingsworth: Well, for the purposes of the record, we don't concur in it, in - - -.

"Court: Well, I'm not asking either one of you whether you concur or not, that's - - - so, you can take the Jury out. Again, I want to thank you for your service; I'm sorry this terminated this way, but, I don't think the Court can tolerate a witness who refuses to testify under Court order, particularly a doctor who is a professional man, and, licensed to practice medicine. I don't think I had any alternative, because it reflects

adversely on the State's witness, and, I would do the same thing if it were to happen as far as the Defense is concerned. It's the first time in twenty years I've ever been confronted with anything like this. I have had Dr. Aguilar testify in other cases in this Court isn't that correct?

"Reporter Hatfield: Yes, sir.

"Court: Many of them, and, given his expert opinion, and, yesterday when he refused to testify, I was quite shocked by the fact that he refused to testify, couldn't believe it, so, I think this is the only remedy, is to find him Guilty of Direct Contempt, levy a fine, and, proceed according to Statute, so again, I'm sorry. We'll try again next time.

"JURY NOW DISCHARGED FROM THIS CAUSE

"AND, THAT WAS ALL THAT WAS HEARD ON THIS DATE IN THIS CAUSE." (A. p. A-28-30)

As quoted above, counsel for Petitioner began his objection that he did not concur in the declaration of mistrial (A. p. A-30) when the Judge interrupted and stated that he was not asking for concurrence by either counsel. (A p. A-30)

On March 15, 1979, defendant filed a Motion to Dismiss and for Discharge of Defendant and Affidavit in support thereof upon the grounds that prosecution of defendant was barred by reason of a previous prosecution. (A. p. A-31) The Indiana statutory basis for a motion to dismiss upon such grounds is contained in Indiana Code 35-3.1-1-4(a) (5) (A. p. A-5), and the Indiana statutory provision barring specified reprosecutions is contained in Indiana Code 35-41-4-3. (A. p. A-7) On April 6, 1979, the court denied Petitioner's Motion to Dismiss and for Discharge of Defendant, and rescheduled the cause for trial. (A. p. A-32)

On May 1, 1979, Petitioner filed a Motion for Certification Pursuant to A. P. 4(B)(5), requesting the trial court to certify that the denial of his Motion to Dismiss and for Discharge of Defendant involved a substantial question of law based upon double jeopardy and that his remedy after judgment was inadequate which would justify an interlocutory appeal thereof to the Indiana Court of Appeals pursuant to Rule 4(B)(5), Indiana Rules of Appellate Procedure. (A. p. A-32) Pertinent portions of Rule 4, Indiana Rules of Appellate Procedure, are set forth in the appendix. (A. p. A-11-12) That Rule requires both the trial court and the court on appeal or a judge thereof to certify that specified grounds exist prior to allowing an appeal of an interlocutory order. The trial court denied Petitioner's Motion for Certification Pursuant to A.P. 4(B)(5) on May 2, 1979. (A. p. A-33)

During the pendency of the trial court proceedings, petitioner presented, without filing, an original action in the Supreme Court of Indiana for writ of mandate, seeking to mandate the trial court to dismiss the information filed against Petitioner and to discharge Petitioner and for a writ of prohibition seeking to prohibit the trial court from proceeding with the second trial of Petitioner. The pertinent Indiana statutory provisions governing writs of mandate and prohibition, Indiana Code 34-1-58-1, 2 and 6, are set forth in the appendix. (A. p. A-8-9) The Indiana Supreme Court Rules of Procedure for Original Actions including writs of mandate and prohibition are also set forth in the appendix. (A. p. A-12-15) On April 24, 1979, the Supreme Court of Indiana conducted a hearing on a temporary writ of mandate and prohibition, and the matter was taken under advisement by the Supreme Court of Indiana. (A. p. A-1) On April 27, 1979, the Indiana Supreme Court unanimously denied Petitioner's petition for a temporary writ of mandate and prohibition without opinion. (A. p. A-1)

On May 2, 1979, Petitioner filed his Verified Petition for Writ of Mandate and Writ of Prohibition in the Supreme

Court of Indiana. (A. p. A-34) Petitioner contended that the trial court had a constitutional and a statutory duty to grant his Motion to Dismiss and for Discharge of Defendant upon the grounds that prosecution was barred by reason of a former prosecution. (A. p. A-36)

The Supreme Court of Indiana denied Petitioner's application for a permanent writ of mandate and prohibition on June 27, 1979, holding that the question was not a proper subject for an original action and that the legal remedy of an appeal was adequate. The Supreme Court of Indiana further held that the trial court had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial. The holding of the Supreme Court of Indiana as to Petitioner's Fifth Amendment and other double jeopardy claims reads as follows:

> "...Relator now requests this Court to order the Marion Superior Court to discharge him on the ground that a retrial would violate the double jeopardy clauses of the United States and Indiana Constitutions and IC §35-41-4-3 [Burns 1979].
>
> "Original actions are viewed with extreme disfavor by this Court. *State ex rel. Gibson General Hospital v. Warrick Cir. Ct.* (1966) 247 Ind. 240, 214 N.E.2d 655. Writs of mandate and prohibition will be issued only where the trial court has an absolute duty to act or refrain from acting. *State ex rel. Wm. H. Block Co. v. Sup. Ct. of Marion Cty.* (1943) 221 Ind. 228, 47 N.E.2d 139. Where the matter lies within the discretion of the trial court, this Court will not consider applications for writs of mandate and prohibition since the legal remedy of an appeal is adequate. *State ex rel. Socony Mobil Oil Co. v. Delaware Cir. Ct.* (1964) 245 Ind. 154, 196 N.E.2d 752; *State ex rel. Jones v. Smith* (1943) 220 Ind. 645, 46 N.E.2d 199.
>
> "The orderly procedure of the trial should be left to the sound discretion of the court trying the case. *State ex rel. Rooney v. Lake Cir. Ct.* (1957) 236 Ind. 345, 140 N.E.2d 217. The granting or denial of a motion for mistrial falls within this rule and will be reversed only where an abuse of judicial discretion is demonstrated. *Bean v. State* (1978)____Ind.____, 371 N.E.2d 713; *Short v. State* (1968) 250 Ind. 459, 237 N.E.2d 258.
>
> "The respondent in the case at bar had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial. The remedy of appeal is adequate to challenge the trial court's discretion in this matter. The question presented is therefore not a proper subject for an original action.
>
> "The petition for a writ of mandate and prohibition is hereby denied.
>
> "DeBruler, Hunter, Pivarnik and Prentice, JJ. concur." (A. p. A-2-3)

The trial court proceedings are still pending against Petitioner, and a second trial of Petitioner is imminent.

REASONS FOR ALLOWANCE OF THE WRIT

The issue presented for review in this case concerns the needless discharge of Petitioner's first jury, over his objection, because of a judicially created and provoked incident which was intended to benefit the prosecution. This case does not involve the usual circumstances justifying a mistrial, such as a deadlocked jury, defense counsel's misconduct, juror bias, or a procedural defect in the proceedings which could not be cured. Rather, this case involves a *sua sponte* declaration of a mistrial over Petitioner's objection based upon an evidentiary and substantive event which affected the guilt or innocence, fact-finding process of the jury as to Petitioner.

This case presents that type of premature trial termination which is requested by neither side, finding its

source in the trial judge's irritation with a State's witness who became unresponsive to the court's interrogation, lost his credibility with the trial judge and was jailed for contempt. The deterioration of the State's case as a result of the court's actions concerning the witness was demonstrated by the immediate declaration of a mistrial over Petitioner's objection. The trial court's actions were impulsive, were without regard to any other alternative, and thereby foreclosed Petitioner's valued right to proceed with his first jury and perhaps to an acquittal. Thus, this case warrants the Court's review by certiorari to consider the Petitioner's Fifth Amendment protection against double jeopardy which bars a second trial of Petitioner under such circumstances.

A. The Protections Afforded by the Double Jeopardy Clause

In this case, jeopardy attached to Petitioner when the jury was impaneled and sworn in Petitioner's first trial under established Indiana law, *Maddox v. State*, 230 Ind. 92, 102 N.E.2d 225, 228 (1952), and as an integral part of the Fifth Amendment guarantee made applicable to the States through the Fourteenth Amendment. *Crist v. Bretz*, ____U.S.____, 98 S.Ct. 2156 (1978). In fact, the mistrial was declared on the third day of trial, after the testimony of ten witnesses. Thus, there is no question as to attachment of jeopardy.

In *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223 (1957), this Court held that the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense according to the following premise:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

This purpose of the Double Jeopardy Clause has been restated in several recent cases decided by this Court during the 1977 and 1976 Terms. *See, e.g., United States v. Scott*, ____U.S.____, 98 S.Ct. 2187, 2192 (1978); *Crist v. Bretz, supra*, 98 S.Ct. at 2159-60; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977); *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 2041 (1977).

In *Burks v. United States*, ____U.S.____, 98 S.Ct. 2141 (1978), this Court held that the Double Jeopardy Clause precludes a second trial of a defendant when a reviewing court has determined there was insufficient evidence to sustain a jury's verdict of guilty. In so holding, the Court relied upon the principle expressed in *Green* that the Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks, supra*, 98 S.Ct. at 2147.

Thus, the Double Jeopardy Clause serves to avoid the risk that a defendant, although in fact innocent, may be convicted by successive decisionmakers. As recently expressed in *United States v. Martin Linen Supply Co., supra*, 430 U.S. at 569, 97 S.Ct. at 1353, the heart of the policy against multiple trials "is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the Government with a potent instrument of oppression." It further serves to prevent the State from unfairly subjecting a defendant to the embarrassment, expense and ordeal of a second trial, along with the repetitive stress and

anxiety of multiple criminal trials.[2] *Green v. United States, supra; Abney v. United States, supra.*

The Double Jeopardy Clause also protects the accused's significant interest in retaining a chosen jury. The history of a defendant's "valued right to have his trial completed by a particular tribunal", *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837 (1949), was recently stated by this Court as follows:

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[2] Petitioner has utilized every available State procedure to seek review of his double jeopardy claim prior to enduring a second trial. On March 15, 1979, the day after the trial court declared a mistrial, Petitioner filed a Motion to Dismiss and for Discharge of Defendant on double jeopardy grounds (A. p. A-31). This motion was denied by the trial court. (A. p. A-32) Petitioner also requested the trial court to certify that the denial of his motion to dismiss involved a substantial question of law based upon double jeopardy and that his remedy after judgment was inadequate, thereby seeking to authorize an interlocutory appeal to the Indiana Court of Appeals. (A. p. A-32) Petitioner's request for certification was denied by the trial court. (A. p. A-33) Under Indiana law no interlocutory appeal can be taken without such certification. *Constanzi v. Ryan*, 368 N.E.2d 12, 16 (Ind. App. 1977).

Petitioner also applied to the Indiana Supreme Court by way of a Petition for Writ of Mandate and Prohibition on the basis of double jeopardy. (A. p. A-34) That petition was based upon the improper termination of the first trial and the infringement of Petitioner's protection against double jeopardy. It is the opinion and judgment of the Indiana Supreme Court denying relief to Petitioner which is sought to be reviewed by Writ of Certiorari in this Court. The Supreme Court of Indiana held that the trial court had the discretion to grant a mistrial in this case and, further, that Petitioner's legal remedy by way of an appeal after a second trial is adequate to challenge Petitioner's double jeopardy claims. However, this Court has repeatedly held that the protection contained in the Double Jeopardy Clause does not require a defendant to incur the second trial, but, rather, it is a guarantee against multiple *trials* for the same offense, as well as against multiple punishments. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 2041 (1977); *Breed v. Jones*, 421 U.S. 519, 532, 95 S.Ct. 1779, 1787 (1975); *United States v. Wilson*, 420 U.S. 332, 346, 95 S.Ct. 1013, 1023 (1975). Because the Double Jeopardy Clause precludes a second trial of Petitioner, his remedy by way of an appeal after another trial and a possible conviction is not adequate.

> "It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.
>
> "Regardless of its historic origin, however, the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn." *Crist v. Bretz, supra*, 98 S.Ct. at 2161.

The purpose of the "valued right" was expressed in *Arizona v. Washington*, ____U.S.____, 98 S.Ct. 824 at 829-30 (1978) as follows:

> "...The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial."

Petitioner recognizes that not every termination of a defendant's initial trial necessarily forecloses a second trial. In two recent cases, this court held that a termination of a defendant's first trial prior to verdict at the election of the defendant does not violate the defendant's valued right to have his trial concluded by the first jury and that the Double Jeopardy Clause is not offended by a second prosecution. In *United States v. Scott, supra*, the Court held

that, where a defendant deliberately chooses to seek a termination of the proceedings against him by way of motion to dismiss prior to verdict and is successful, an appeal by the government is not barred by the federal statute concerning government appeals on double jeopardy grounds. Under such circumstances, the Double Jeopardy Clause and the encompassed valued right to go to the first jury are not violated based upon the defendant's voluntary choice. Similarly, in *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976), this Court held that the Double Jeopardy Clause was not violated by a retrial of the defendant where his first trial ended in a mistrial at defendant's own request and after the trial judge proposed several alternatives to a mistrial. In *Dinitz*, the trial court excluded defense counsel's attorney from the courtroom for repeated misconduct during opening statement. The trial judge allowed the defendant three alternative courses, including a stay or recess, a continuation of the trial with other counsel or a mistrial. The defendant chose to move for a mistrial, and this Court held that a second trial would not violate the Double Jeopardy Clause for the following reason:

> "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *Dinitz, supra*, 424 U.S. at 609; 96 S.Ct. at 1080.

Also, a defendant's valued right to have his trial concluded before the first jury impaneled may be subordinated to "the public's interest in fair trials designed to end in just judgments" where the defendant's conduct forms the basis for the mistrial. *Arizona v. Washington, supra*, 98 S.Ct. at 836, *quoting Wade v. Hunter, supra*, 336 U.S. at 689, 69 S.Ct. at 837. However, there is no public interest in, and the Double Jeopardy Clause prohibits, repeated trials designed to end in a conviction.

In this case, the trial court interjected questions to the State's witness, a deputy coroner, concerning the cause of death which the prosecution had neglected to ask. For reasons wholly unrelated to Petitioner, the deputy coroner refused to give his opinion as to the cause of death. A confrontation ensued between the trial judge and the deputy coroner over the witness' refusal to give his opinion and ended with the trial judge holding the deputy coroner in direct contempt of court in the presence of the jury.

During the confrontation, the trial judge completely ignored the Petitioner. The trial court then declared a mistrial on its own motion, completely oblivious of any other alternatives and of Petitioner's valued right to have his fate determined by that jury. The trial judge's grounds for declaring the mistrial implicitly recognize that the prosecutor needed another day in court and that the State would be unable to obtain a conviction of Petitioner from that jury. The trial judge's interjected questions to the State's witness, the confrontation with the witness, the adjudication of contempt of court in the presence of the jury, and the declaration of a mistrial were all designed to assist the prosecution and were all to the detriment of this Petitioner.

The underlying rationales of the Double Jeopardy Clause apply in this case to bar a second trial of Petitioner. He has lost his valued right to have his trial completed by the first jury which may have held a reasonable doubt as to the cause of death and as to Petitioner's guilt and which could have resulted in his acquittal. Further, a second trial would enhance the possibility of a conviction by affording the prosecution an opportunity to strengthen its case. Moreover, Petitioner was exposed to the public embarrassment and anxiety of three days of trial with ten witnesses testifying on behalf of the State. Petitioner would be subjected to the embarrassment, expense and ordeal of a second trial. These fundamental principles dictate that a second trial of Petitioner is barred under the Double Jeopardy Clause.

B. There Was No Manifest Necessity for a Mistrial

The decision stating the principles applicable to double jeopardy claims following a court's *sua sponte* declaration of a mistrial, without the consent of the defendant, is *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824). *Perez* involved a deadlocked jury and adopted the following test of "manifest necessity" for a mistrial:

> "...We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner." *Perez, supra*, 9 Wheat. at 580.

Since *Perez*, this Court has had numerous occasions to consider whether manifest necessity existed, justifying a mistrial prior to verdict without the defendant's consent. Although each case turns on its own facts, there are certain situations which indicate that a mistrial is proper. The classic example is when the jury is unable to agree. *Perez, supra.* In *Wade v. Hunter, supra*, the tactical situation brought about by a rapidly advancing army in Germany during World War II was an extraordinary circumstance requiring discontinuance of defendant's first court-martial proceedings and reassignment to another. Jury bias may necessitate a mistrial. Thus, a second trial was not barred in *Thompson v. United States*, 155 U.S. 271, 15 S.Ct. 73 (1894), where a juror was disqualified because he was a member of the grand jury that indicted the defendant. In *Simmons v. United States*, 142 U.S. 148, 12 S.Ct. 171 (1891),

reprosecution was not barred where one of the jurors had sworn falsely on *voir dire* that he did not know the defendant, and, in addition, a letter published in a newspaper by defendant's counsel commenting on the evidence had been read by that juror and other members of the jury.

Other situations include *Gori v. United States*, 367 U.S. 369, 81 S.Ct. 1523 (1961), where the defendant neither consented nor objected to a *sua sponte* mistrial, and double jeopardy was not offended where the trial court apparently concluded that the prosecution attempted to inform the jury of other crimes of the accused and declared a mistrial in the sole interest of the defendant. Where the defendant's counsel is the cause of the mistrial and the resulting possible jury bias, reprosecution is not barred. *Arizona v. Washington, supra.* A procedural error in the proceedings which could not be cured justified a mistrial in *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066 (1973). Of course, if the defendant himself moves for the mistrial, the Double Jeopardy Clause is not offended because the defendant has retained his right of control over the course of events by requesting the mistrial. *United States v. Dinitz, supra*, 424 U.S. at 609, 96 S.Ct. at 1080.

This case presents none of the above situations. The defendant did not cause or contribute in any manner to the trial court's confrontation with the State's witness. The defendant objected to the mistrial and was abruptly prevented from completing his objections by the trial judge. Furthermore, there was no procedural error or irregularity which could not be cured and which would require a reversal after a conviction. On the contrary, several remedies short of aborting the trial existed here and will be discussed *infra*. The Court's confrontation with the witness went to the very heart of the case, bearing on the lack of proof of guilt of Petitioner. Something did not go wrong with the procedure in this case, but with the substance of the case—the State's proof of the cause of death.

The substantive problem resulting in the mistrial in this case began with the lack of preparation of the prosecutor in dealing with the State's witness and the prosecutor's failure to ask questions concerning the cause of death. The trial judge then interjected himself into the proceedings by asking questions on his own initiative as to such matters. (R. p. 202; A. p. A-23) Although the deputy coroner refused to give his opinion as to the cause of death during the second day of trial, he was nevertheless recalled to the stand on the third day of trial for redirect examination by the State. At that time, the trial judge again interjected himself into the proceedings, and the witness persisted in refusing to give his opinion as to the cause of death. (A. p. A-23-24) The trial court not only compounded the unpreparedness of the prosecution but also caused the incident leading to the mistrial.

This is not a jury bias case. The trial court declared the mistrial based upon the deputy coroner's refusal to testify. In so doing, the trial court stated this would have an adverse affect on the jury and would deprive the State of an important witness because it reflected adversely on the witness' credibility. The reasons assigned by the trial court for declaring the mistrial were a blatant invasion of the province of the jury. Under Indiana law, the jury is the sole judge of the credibility of all the witnesses, and the trial court has no right to invade the province of the jury by intimating its opinion as to the credibility of any witness or the weight to be given to any testimony. *Garvin v. State*, 255 Ind. 215, 263 N.E.2d 371, 372 (1970); *Pritchard v. State*, 284 Ind. 566, 230 N.E.2d 416, 418 (1967). A trial judge is barred from interfering with or superseding the jurors' independent judgment in a manner contrary to the interests of the defendant. *United States v. Martin Linen Supply Co., supra*, 430 U.S. at 573, 97 S.Ct. at 1355.

The credibility of the deputy coroner was a matter exclusively within the province of the jury, and the trial judge had absolutely no discretion whatsoever to declare a

mistrial on that basis. The trial judge invaded the province of the jury by determining, in his own opinion, that the credibility of the State's witness had been adversely affected. Thus, there was no necessity for the declaration of a mistrial, much less a "manifest" necessity. In *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974), *cert. den.* 420 U.S. 991, 95 S.Ct. 1427 (1975), it was specifically held that the reluctance of a prosecution witness to testify is not an occasion amounting to manifest necessity for mistrial. Rather, the court's duty is to secure the witness' testimony if compellable, and to give appropriate curative instructions to the jury, if necessary, to restore order in the trial. *Anderson, supra*, 509 F.2d at 326. Neither this alternative, nor others, were considered by the trial judge in this case. (Discussed, *infra*)

Virtually all of the cases have recognized that there is a point beyond which the trial judge cannot go in granting a mistrial over the objection of the defendant. That point is reached where the judge or the prosecutor terminates the trial when it appears that the jury might not convict and thereby affords the prosecution a second and more favorable opportunity to convict the defendant. In *Gori v. United States, supra*, 367 U.S. at 369, 81 S.Ct. at 1526-27, the Court held that a mistrial bars reprosecution under the Double Jeopardy Clause where:

> "...the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused."

This limitation was expressed in *Green v. United States, supra*, 355 U.S. at 188, 78 S.Ct. at 244, as preventing "a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict." *Accord, United States v. Dinitz, supra*, 424 U.S. at 611, 96 S.Ct. at 1081; *Arizona v.*

Washington, supra, 98 S.Ct. at 832; *Illinois v. Somerville, supra*, 410 U.S. at 464, 93 S.Ct. at 1070.

This case falls within the limitation expressed in these cases because the trial judge declared the mistrial at a time when the prosecution's case was going badly, based upon an evidentiary insufficiency which could have led to the acquittal of Petitioner, in an effort to afford the prosecution a more favorable opportunity to convict Petitioner at a second trial. Thus, this case is one of the extreme class of cases where the trial judge aborted the trial to benefit the prosecution after a judicially-created incident.

In two cases, this Court has recognized that manifest necessity cannot be created by errors on the part of the prosecutor or the judge. In *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033 (1963), a jury had been selected and sworn, but no evidence had been heard, when the prosecution asked that the jury be discharged because its key witness on two counts was not present through the prosecution's failure to subpoena the witness. The judge granted the prosecution's motion for mistrial, over the defendant's objection, and this Court held that double jeopardy resulted. Although the Court refused to say that the absence of a government witness could never justify the discontinuance of a trial, it held that any doubt must be resolved in favor of the liberty of the defendant. *Downum, supra*, 372 U.S. at 738, 83 S.Ct. at 1035.

In *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (1971), (plurality opinion), the jury had been impaneled and sworn and the first witness was called for the pu ose of introducing exhibits. When the second witness was called, the trial judge inquired whether the witness had been warned of his constitutional rights against self incrimination and concluded that any warnings given were inadequate. The trial judge then discharged the jury to enable the government's witnesses to consult with their own attorneys concerning their constitutional rights. This Court held that there was no manifest necessity for the *sua*

sponte declaration of the mistrial, noting that a trial judge must recognize that lack of preparedness by the government to continue a trial directly implicates the policies underpinning the Double Jeopardy Clause. *United States v. Jorn, supra*, 400 U.S. at 486, 91 S.Ct. at 557-58. *Jorn* emphasized that a *sua sponte* declaration of mistrial deprives a defendant of his valued right to have his trial completed by a chosen jury and that the doctrine of manifest necessity does not give a license to trial judges to terminate cases; rather, it is a command not to terminate criminal trials unless an overriding event has taken place:

> "In the absence of such a motion [by the defendant for mistrial], the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to proceed with the first jury] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn, supra*, 400 U.S. at 485, 91 S.Ct. at 557.

Jorn noted that, even where a defendant moves for a mistrial, reprosecution may be barred if the motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal. *Id.* n. 12.

This Court recently applied the *Perez* doctrine of manifest necessity in two cases. *Illinois v. Somerville, supra,; Arizona v. Washington, supra.* In *Somerville*, a jury had been impaneled and sworn, but no evidence had been presented. The State moved for a mistrial because the indictment charging the defendant was defective and could not be cured by amendment under Illinois procedural and substantive law. The defect in the indictment was jurisdictional, could not be waived by the defendant, and would have required reversal on appeal after a conviction. In applying the *Perez* doctrine of manifest necessity, this Court held that:

> "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be

reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." *Illinois v. Somerville, supra*, 410 U.S. at 464, 93 S.Ct. at 1070.

Somerville does not control this case for several reasons. First, there was no procedural irregularity in Petitioner's first trial. The mistrial-causing event was an evidentiary and substantive matter which affected the jury's guilt or innocence determination of Petitioner. Secondly, no peculiarity of Indiana law was involved which would make a reversal on appeal after conviction a certainty. Most importantly, in *Somerville*, the defect in the indictment could not be cured, and there were no other alternatives to a mistrial. All of these elements are absent in this case. The reluctance of the deputy coroner to give his opinion on the cause of death had occurred the day prior to the declaration of mistrial. The witness' unwillingness to testify evidenced a lack of preparation by the prosecutor which was not resolved by the following day when the prosecutor recalled the deputy coroner for redirect examination. The prosecutor had apparently failed to prepare the deputy coroner to testify, but the prosecutor's failure to iron out the difficulties with this witness on the third day of trial was without excuse. Given the witness' refusal to state his opinion as to certain matters on the second day of trial, it was very predictable that his reluctance to testify would continue on the third day of trial absent action by the prosecutor overnight. It could not be said on the third day of trial that the prosecutor or the trial judge were taken by surprise by the deputy coroner's refusal to answer, and there was no further excuse for the prosecutor's lack of preparation of this witness. Not only was the witness' refusal to testify preventable through interim prosecution

efforts, the incident which occurred on the third day resulting in the mistrial could have been corrected by the trial court. Numerous other alternatives to a mistrial were available. (Discussed, *infra*)

In *Arizona v. Washington, supra*, the trial court granted the State's motion for mistrial, over the defendant's objection, based upon defense counsel's improper argument in opening statement. The defendant's attorney had referred to testimony of witnesses in defendant's first trial, which had been reversed on appeal, and accused the prosecutor of hiding evidence in the first trial. This Court held that defense counsel's improper argument may have affected the impartiality of the jury and that the mistrial was supported by a "high degree" of necessity which was required in cases of this kind. *Arizona v. Washington, supra*, 98 S.Ct. at 835.

In concluding that a "high degree" of necessity is required to warrant the declaration of a mistrial over defendant's objection, *Arizona* recognized that a mistrial is suspect when something goes wrong with the prosecution's case, explaining as follows:

"The question whether that 'high degree' has been reached is answered more easily in some kinds of cases than in others. At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice.... Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Arizona v. Washington, supra*, 98 S.Ct. at 831-32.

Arizona also held that the burden is on the State to demonstrate manifest necessity for a mistrial over defendant's objection, as follows:

> "Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant.
>
> "The words 'manifest necessity' appropriately characterize the magnitude of the prosecutor's burden." *Arizona v. Washington, supra*, 98 S.Ct. at 830.

Because Petitioner's first trial was aborted by the trial judge based upon a State's witness' refusal to give his opinion as to the cause of death, strictest scrutiny of the trial court's action is required by *Arizona*, and it is the State's burden to demonstrate manifest necessity for the mistrial.[3] The State cannot meet that burden under the

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[3] The State argued in the proceedings before the Supreme Court of Indiana that the trial court's decision to declare a mistrial in this case should be sustained if any legal theory could be found to support it, regardless of whether the reason given by the trial court was correct or not. Thus, the State necessarily ignores the test for review established in *Jorn* and *Arizona*. The State then argued that, if one searched the record, there were two grounds that would support the trial court's mistrial ruling, independent of the grounds stated by the trial court at the time of the mistrial. The first independent ground was that there was reversible error in the proceedings by the trial court's giving of preliminary instruction 2A concerning the burden of proof on the issue of insanity. The second independent ground justifying the mistrial, according to the State, was that the defendant's prior motion for a mistrial because of the giving of preliminary instruction 2A constituted a waiver of his right to object to the mistrial declared *sua sponte* by the court.

The State's premise as to the standard of review is erroneous, as well as the two purported "independent grounds" supporting the mistrial.

In testing the propriety of the mistrial in this case, the reasons assigned by the trial judge in declaring the mistrial are controlling. The record cannot be searched for other errors which might possibly have afforded grounds for a mistrial. The specific reasons given by the trial judge for the mistrial are controlling under both federal double jeopardy principles and Indiana law concerning the exercise of judicial discretion. *Arizona v. Washington, supra*, 98 S.Ct. at 833 n. 28 (holding that, "if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate"); *City of Elkhart v. Middleton*, 265 Ind. 514, 356 N.E.2d 207 at 210 (1976) (holding that "on an appeal which questions the exercise of judicial discretion it is necessary to evaluate the action of the trial court upon the reasons it specifically articulated, rather than to attribute to it some legitimate but unexpressed reason.") Thus, the State's "search the record for error" approach is untenable.

Even if there could be "independent grounds" supporting a mistrial order, the two grounds suggested by the State miss the mark. The error in giving preliminary instruction 2A on the burden of proof could have been cured by its withdrawal and the giving of a proper final instruction. *Todd v. State*, 229 Ind. 664, 101 N.E.2d 45 (1951); *Buntin v. State*, 68 Ind. 38 (1879). Thus, any error in the preliminary instruction was not of the *Illinois v. Somerville, supra*, type. The second "independent ground" justifying a mistrial was purportedly the Petitioner's waiver of the right to object to the trial termination because he had earlier filed a motion for mistrial because of the faulty preliminary instruction. This court has held that "waiver" connotes the voluntary relinquishment of a known right. *Green v. United States, supra*, 355 U.S. at 191, 78 S.Ct. at 226. It defies reason to suggest that Petitioner's prior motion for a mistrial on other grounds was a knowing and voluntary waiver of his right to object to a *subsequent* mistrial under circumstances which had not yet occurred. Indiana has held that, even where the defendant moves for a mistrial, he has not forfeited his double jeopardy rights where the discharge of

circumstances of this case. Neither the Petitioner nor Petitioner's counsel caused or contributed to the incident provoking the mistrial. It was an incident involving a deficiency in the State's case, through the fault or neglect of the prosecutor, and was caused by the overreaction of the trial judge to a problem or weakness in the State's case.

This case does not fall within the usual situations in which manifest necessity has been demonstrated. It is not a case of a deadlocked jury, *Perez*, *supra*; a prejudicial incident caused by defendant's counsel affecting the impartiality of the jury, *Arizona*, *supra*; a technical defect in the proceeding which could not be cured under the peculiarity of state law, *Somerville*, *supra*; jury bias, *Simmons*, *supra*; or where defendant himself has moved for the mistrial, thereby allowing the defendant to retain primary control over the course to be followed, *Dinitz*, *supra*. This case falls within the extreme class of cases, of which *Downum* and *Jorn* are representative, which dictate that manifest necessity cannot be created by errors on the part of the prosecutor or the judge but must arise from some source outside their control. The purported error in Petitioner's first trial was not caused by Petitioner but by the combined errors of the prosecutor and the trial judge which precluded Petitioner's fundamental right under the Double Jeopardy Clause to have his fate determined by the first jury. The actions taken by the trial judge were intended to benefit only the State, contrary to the interests of Petitioner, at a time when the jury could have held a reasonable doubt as to Petitioner's guilt. Under the Fifth Amendment, the State cannot be permitted another opportunity to bolster its case, allowing it a "second bite at the apple", negating the purposes of the Double Jeopardy Clause. *Burks v. United States*, *supra*, 98 S.Ct. at 2150.

C. There Were Other Alternatives to a Mistrial

"Manifest necessity" by definition implies that there is no other recourse open to the trial court but a mistrial. Where a mistrial has been declared over defendant's objection,

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the first jury was necessitated by the coercion of the prosecutor and trial judge in forcing him to trial without counsel. *Crim v. State*, 156 Ind. App. 66, 294 N.E.2d 822 (1973). *See also*, *Cardenas v. Superior Court*, 14 Cal. Rptr. 657, 363 P.2d 889 (Cal. 1961) (a defendant who has made a motion for mistrial which is joined in by the prosecutor may nevertheless withdraw his motion before the Court has acted upon it, resulting in double jeopardy when the prosecutor's motion is granted over the defendant's objection).

this Court has consistently recognized that the trial court must consider alternative courses of action before proceeding to abort the trial. The failure to consider alternative courses of action was emphasized in *Jorn* as a factor barring reprosecution of the defendant, as follows:

> "Applying these considerations to the record in this case, we must conclude that the trial judge here abused his discretion in discharging the jury... It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial." *United States v. Jorn*, *supra*, 400 U.S. at 487, 91 S.Ct. at 558.

In *United States v. Dinitz*, *supra*, after defendant's counsel had made prejudicial remarks in opening statement, the trial judge excluded defendant's counsel from the courtroom and set forth three alternative courses that might be followed which resulted in defendant's counsel choosing to move for a mistrial. In *Arizona v. Washington*, *supra*, this Court specifically held that the trial judge acted responsibly and deliberately, affording careful consideration to defendant's interest in having his trial concluded and in affording both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. *Arizona*, *supra*, 98 S.Ct. at 835. *Arizona* also held that, if a trial judge acts irrationally or irresponsibly, his action cannot be condoned. *Id.*

The record in this case clearly demonstrates that the trial judge totally ignored the interests of Petitioner in

declaring the mistrial and that the trial judge was oblivious to any other alternatives. The "choice" so vital to the valued right of a defendant was never made available to him. Both the trial judge and the prosecutor had notice of the deputy coroner's reluctance to give his opinion on the cause of death based upon his testimony of the previous day. Nevertheless, the trial judge again interjected the same question on the morning of the third day of trial which elicited the same response from the witness and the subsequent contempt proceedings. Thus, there was no element of surprise in the testimony of the State's witness, and ample time was available to deal with the problem with this witness prior to calling in the jury the following day.

In addition to the trial judge's opportunity to discuss the situation with counsel outside the presence of the jury, there were numerous other options open to the trial court after the contempt proceedings occurred. These options, other than mistrial, included: (1) to simply proceed with the trial after the contempt proceedings; (2) to question the members of the jury as to any possible jury bias as a result of the incident which might have affected their ability to reach an impartial verdict; (3) to admonish and instruct the jury not to consider any testimony which the court deemed improper; and (4) to continue or stay the trial until such time as the State could obtain the coroner or another deputy coroner, assuming that such additional testimony was necessary to the State's case. The trial judge not only failed to consider any of these alternatives, he failed to consider excusing the jury during the contempt proceedings and resuming the trial thereafter. The record clearly shows that the trial judge abruptly aborted the trial by his statement that he was not asking counsel for either party to concur in the mistrial. Indeed, he interrupted Petitioner's counsel when he was making his objection to the mistrial, foreclosing any further comment by either Petitioner's counsel or the prosecutor. Without question, the actions of this trial judge meet the classification of impropriety

which cannot be condoned. *Arizona v. Washington, supra,* 98 S.Ct. at 835.

D. The Declaration of a Mistrial in This Case Was the Equivalent of an Acquittal of Petitioner

The circumstances surrounding the declaration of a mistrial in this case were tantamount to a finding by the trial judge that the State would not be able to obtain a conviction of Petitioner in his first trial. The trial court declared the mistrial because the refusal of the deputy coroner to testify "would deprive the State of an important witness" (A. p. A-29), simply because his refusal to testify reflected adversely on his credibility. (A. p. A-30) This was equivalent to a finding by the trial court that there had been an insufficiency in the evidence as to the cause of death, and thus the State had failed to prove an essential element of its case. Based upon this evidentiary insufficiency, the trial judge's declaration of a mistrial is the equivalent of an acquittal of Petitioner.

In *United States v. Martin Linen Supply Co., supra,* this Court held that the entry of a judgment of acquittal by a trial court, after the jury was deadlocked and unable to reach a verdict, precluded an appeal by the government under the Double Jeopardy Clause. Even if the trial court acted erroneously in directing a verdict in favor of the defendant, the determination by the trial court of an evidentiary insufficiency constitutes an acquittal, and that determination cannot be reviewed on appeal. *Martin Linen* emphasized that what constitutes an "acquittal" is not controlled by the form of the trial judge's action, and the reviewing court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co., supra,* 430 U.S. at 571; 97 S.Ct. at 1354-55. In *Burks v. United States, supra,* this Court held that the Double Jeopardy Clause prohibits a second trial of a defendant after a reviewing court has determined there was

insufficient evidence to sustain the conviction. Thus, an acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed, and a second trial is barred on double jeopardy grounds. As reaffirmed in *United States v. Scott, supra*, the trial judge's designation of his ruling does not control the classification of his action, and an acquittal results, whatever the label, when the ruling actually represents a resolution in defendant's favor of all or a part of the factual elements of the offense charged. *United States v. Scott, supra*, 98 S.Ct. at 2196-97.

Not only is an acquittal the practical result of the trial court's action, it is the legal result under Indiana law. Indiana has long recognized that the discharge of a jury over the defendant's objection, and without legal necessity, is the equivalent of an acquittal of the defendant. *State v. Reed*, 168 Ind. 588, 81 N.E. 517 (1907); *State v. Wamire*, 16 Ind. 357 (1861); *Armentrout v. State*, 214 Ind. 273, 15 N.E.2d 363 (1938). In *Armentrout*, the trial court declared a mistrial *sua sponte* after defendant's counsel made improper remarks in opening statements. In holding that there was no legal necessity for the discharge of the jury and that the circumstances were equivalent to an acquittal, the court quoted approvingly from *Wharton's Criminal Law*, 12 Ed., Vol. 1, §395, p. 548, as follows:

> " 'After the trial of a criminal charge has been duly entered upon, before a court regualrily [sic] organized, and having jurisdiction of the subject matter of the charge, and competent to try the defendant, on an indictment sufficient to support any judgment that may be rendered, with a lawful jury properly selected and sworn, a discharge of such jury, without the consent of the accused, and without the existence of a state of facts under which the law provides for a discharge of a jury without a verdict, is equivalent to an acquittal of the defendant of the charge, and he cannot thereafter be tried thereon. The only causes for which a jury impanelled and sworn to try an accused on a criminal charge can be discharged by the court without a verdict are: (1) Consent of the prisoner; (2) Illness of (a) one of the jurors, (b) the prisoner, or (c) the court; (3) Absence of a juryman; (4) Impossibility of the jurors agreeing on a verdict; (5) Some untoward accident that renders a verdict impossible; and (6) Extreme and overwhelming physical or legal necessity' " *Armentrout v. State, supra*, 15 N.E.2d at 364.

In this case, the trial judge's label of "mistrial" is not controlling. The circumstances surrounding the mistrial suggest that the trial court found an evidentiary deficiency in the State's case. Once the trial court made that judgment, regardless of its propriety, it in effect was an acquittal of Petitioner.

CONCLUSION

This Court has consistently recognized that a trial court's *sua sponte* declaration of a mistrial over a defendant's objection violates the Double Jeopardy Clause when the mistrial is created by judicial or prosecutorial manipulation. Those are the circumstances of this case. Lack of preparation by the prosecutor was compounded by a judicially-created excuse for a mistrial. The trial judge's partiality in favor of the State in declaring the mistrial was tantamount to a finding that Petitioner could not be convicted by his first jury, rendering the mistrial a functional acquittal. Petitioner's valued right to proceed with the first jury, which may have found him innocent of the charges, was abruptly foreclosed by the trial court's termination of the trial without any regard for the interests of Petitioner. The Double Jeopardy Clause forbids a second

trial of Petitioner in order to afford the prosecution a more favorable opportunity to convict him.

Respectfully submitted,

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Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

WALTER RAYMOND WHITE,
Petitioner,
vs.
STATE OF INDIANA,
Respondent.

STATE OF INDIANA, *EX REL.*
WALTER RAYMOND WHITE,
Petitioner,
vs.
THE MARION SUPERIOR COURT, CRIMINAL DIVISION, NO. 3, and THE HONORABLE CHARLES C. DAUGHERTY,
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Certiorari has been personally served upon the following counsel, pursuant to Rule 33(1), (3)(b), Revised Rules, Supreme Court of the United States, by hand-delivering three (3) copies of the same to each counsel at their offices:

The Honorable Stephen Goldsmith,
Prosecutor of Marion County
19th Judicial Circuit of Marion County
560 City-County Building
Indianapolis, Indiana 46204

The Honorable Theodore L. Sendak
Attorney General, State of Indiana
State House, Room 219
Indianapolis, Indiana 46204

The Honorable Charles C. Daugherty
Marion Superior Court, Criminal Division,
Room No. 3
City County Building
Indianapolis, Indiana 46204

Dated this 24th day of September, 1979.

Martha S. Hollingsworth

Martha S. Hollingsworth

Bingham, Summers, Welsh & Spilman
2700 Indiana National Bank Tower
One Indiana Square
Indianapolis, Indiana 46204

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IN THE
SUPREME COURT OF INDIANA

"Filed
Marjorie H. O'Laughlin
June 27, 1979
Clerk of the
Indiana Supreme and
Court of Appeals
1:15 P.M."

STATE OF INDIANA	)	
ex rel.	)	
WALTER RAYMOND	)	
WHITE,	)	
Relator,	)	
v.	)	
THE MARION	)	NO. 579 S 119
SUPERIOR COURT,	)	
CRIMINAL DIVISION,	)	
NO. 3, and the	)	
HONORABLE	)	
CHARLES C.	)	
DAUGHERTY,	)	
Respondents.	)	

ORIGINAL ACTION

GIVAN, C. J.

On April 24, 1979, this Court conducted a hearing on a temporary writ of mandate and prohibition. The matter was taken under advisement and on April 27, the petition was unanimously denied. We now deny the application for a permanent writ.

Relator Walter R. White was charged with two counts of murder in the Marion Superior Court. On March 12, 1979, a jury was impanelled and the trial was commenced. Two days of testimony and evidence followed. The final witness on the second day of trial was Dr. Josefino C. Aguilar, a pathologist at Wishard Memorial Hospital. Dr. Aguilar had performed the autopsies on the two purported victims. During his testimony, Dr. Aguilar refused, in the presence of the jury, to answer questions propounded by the deputy prosecutor on one occasion, by defense counsel on four occasions and by the court on two occasions. The next morning, March 14, Dr. Aguilar was recalled to the stand. When the court ordered him to answer questions propounded by the court, he twice refused. Aguilar stated that the reason for his refusal was that the "Prosecutor's Office, time and, time again, refuse to give the courtesy that they would give an ordinary expert witness..." Hence, he stated, he would testify only as to facts and would not give his expert opinion on any issues. Thereupon, the court found him in direct contempt of court, levied a fine of $50.00 and sentenced him to five days in jail. Following this series of events, all in the presence of the jury, the court declared a mistrial in view of the adverse impact on the jury. Relator now requests this Court to order the Marion Superior Court to discharge him on the ground that a retrial would violate the double jeopardy clauses of the United States and Indiana Constitutions and IC §35-41-4-3 [Burns 1979].

Original actions are viewed with extreme disfavor by this Court. *State ex rel. Gibson General Hospital v. Warrick Cir. Ct.* (1966) 247 Ind. 240, 214 N.E. 2d 655. Writs of mandate and prohibition will be issued only where the trial court has an absolute duty

to act or refrain from acting. *State ex rel. Wm. H. Block Co. v. Sup. Ct. of Marion Cty.* (1943) 221 Ind. 228, 47 N.E.2d 139. Where the matter lies within the discretion of the trial court, this Court will not consider applications for writs of mandate and prohibition since the legal remedy of an appeal is adequate. *State ex rel. Socony Mobil Oil Co. v. Delaware Cir. Ct.* (1964) 245 Ind. 154, 196 N.E. 2d 752; *State ex rel. Jones v. Smith* (1943) 220 Ind. 645, 46 N.E. 2d 199.

The orderly procedure of the trial should be left to the sound discretion of the court trying the case. *State ex rel. Rooney v. Lake Cir. Ct.* (1957) 236 Ind. 345, 140 N.E. 2d 217. The granting or denial of a motion for mistrial falls within this rule and will be reversed only where an abuse of judicial discretion is demonstrated. *Bean v. State* (1978) ____Ind.____, 371 N.E.2d 713; *Short v. State* (1968) 250 Ind. 459, 237 N.E. 2d 258.

The respondent in the case at bar had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial. The remedy of appeal is adequate to challenge the trial court's discretion in this matter. The question presented is therefore not a proper subject for an original action.

The petition for a writ of mandate and prohibition is hereby denied.

DeBruler, Hunter, Pivarnik and Prentice, JJ. concur.

CONSTITUTION OF THE UNITED STATES

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF INDIANA

Article 1, §14. Former jeopardy—Self-incrimination.—No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself.

INDIANA STATUTES

35-42-1-1. Murder.—A person who:

(1) Knowingly or intentionally kills another human being; or

(2) Kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony. [IC 35-42-1-1, as added by Acts 1976, P.L. 148, §2, p. 718; 1977, P.L. 340, §25, p. 1533.]

35-3.1-1-4. Motion to dismiss.—(a) The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds:

(1) The indictment or information or any count thereof, is defective under section 6 [35-3.1-1-6] of this chapter.

(2) Misjoinder of offenses or parties defendant, or duplicity or [of] allegation in counts.

(3) The grand jury proceeding was defective.

(4) The defendant has immunity with respect to the offense charged.

(5) The prosecution is barred by reason of a previous prosecution.

(6) The prosecution is untimely brought.

(7) The defendant has been denied the right to a speedy trial.

(8) There exists some jurisdictional impediment to conviction of the defendant for the offense charged.

(9) The indictment or information does not state the offense with sufficient certainty or the facts stated do not constitute an offense.

(b) Except as otherwise provided, a motion pursuant to this section shall be made prior to arraignment and plea. A motion made thereafter may be summarily denied if based upon a ground specified in subdivision (a)(1), (a)(2), (a)(3), or (a)(9) of this section. A motion to dismiss based upon a ground specified in subdivision (a)(4), (a)(5), (a)(6), or (a)(7) of this section may be made or renewed at any time before or during trial. A motion to dismiss based upon lack of jurisdiction over the subject matter may be made at any time.

(c) Upon the motion to dismiss, a defendant who is in a position adequately to raise more than one ground in support thereof shall raise every such ground upon which he intends to challenge the indictment or information. A subsequent motion based upon a ground not so raised may be summarily denied, although the court, in the interest of justice and for good cause shown, may entertain and dispose of such a motion on the merits.

(d) Upon the motion to dismiss, the court shall:

(1) Overrule the motion to dismiss;

(2) Grant the motion to dismiss and discharge the defendant; or

(3) Grant the motion to dismiss and deny discharge of the defendant if the court determines that the

ground or grounds alleged in the motion may be cured by amendment pursuant to section 5 [35-3.1-1-5] of this chapter and the prosecutor has moved for leave to amend. If the court grants the motion to dismiss the indictment or information and does not discharge the defendant and grants leave to amend, any prior order imposing conditions of release pending trial shall stand unless otherwise modified or removed by an appropriate order of the court.

(e) The order of dismissal shall not, of itself, constitute a bar to a subsequent prosecution of the same offense except as otherwise modified or removed by an appropriate order of the court. [IC 35-3.1-1-4, as added by Acts 1973, P.L. 325, §3, p. 1750; 1978, P.L. 2, §3525, p. 2.]

35-41-4-3. Prosecution barred for same offense.—(a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

(1) The former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.); or

(2) The former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination, (ii) it was physically impossible to proceed with the trial in conformity with law, (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict

reversible as a matter of law, (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state, (v) the jury was unable to agree on a verdict, or (vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred. [IC 35-41-4-3, as added by Acts 1976, P.L. 148, §1, p. 718; 1977, P.L. 340, §18, p. 1533.]

34-1-58-1. Actions by complaint and summons submitted for writ of mandate in circuit and superior courts—When mandate and prohibition issued by Supreme Court and Appellate Court.—Writs of mandate in the circuit and superior courts of this state are hereby abolished, and the causes of action heretofore remedied by means of such writs shall hereafter exist and be remedied by means of complaint and summons in the name of the state on relation of the party in interest, in the circuit, superior and probate courts of this state, as other civil actions, and shall be known as actions for mandate. Writs of mandate and prohibition may issue out of the Supreme and Appellate Courts of this state in aid of the appellate powers and functions of said courts respectively. Such writs of mandate may issue out of the Supreme Court of Indiana to any and all inferior courts compelling the performance of any duty enjoined by law upon such inferior courts including the granting of changes of venue from the county in cases where such change of venue is allowed by law, and timely, proper and sufficient motion and affidavit has been filed therefor, and such change of venue has

been refused. Writs of prohibition may also issue out of the Supreme Court of Indiana to such inferior courts to restrain and confine such inferior courts to their respective lawful jurisdiction. [Acts 1881 (Spec. Sess.), ch. 38, §803, p. 240; 1911, ch. 223, §1, p. 541; 1915, ch. 87, §1, p. 207; 1933, ch. 102, §1, p. 688; 1955, ch. 253, §1, p. 647; 1963, ch. 278, §1, p. 424.]

34-1-58-2. To whom, and for what purpose.—The action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer or person to compel the performance of any act which the law specifically enjoins, or any duty resulting from any office, trust or station. [Acts 1881 (Spec. Sess.), ch. 38, §804, p. 240; 1911, ch. 223, §2, p. 541.]

34-1-58-6. Writ of prohibition.—The writ of prohibition shall command the court and party to whom it shall be directed to refrain from any further proceedings in the matter therein specified, until the return of the writ and the further order of the court thereon; and upon the return, to show cause why they shall not be absolutely restrained from any further proceedings in the matter. [Acts 1881 (Spec. Sess.), ch. 38, §811, p. 240.]

INDIANA RULES OF PROCEDURE

APPELLATE RULE 4
Consideration of Appeals

(A) Appeals from Final Judgments. Appeals may be taken by either party from all final judgments of Circuit, Superior, Probate, Criminal, Juvenile, County, and where provided by statute for Municipal Courts. A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a

final judgment, and an appeal may be taken therefrom. The Supreme Court shall have exclusive jurisdiction of:

(1) Admissions to practice law;

(2) The discipline and disbarment of attorneys admitted to the practice of law;

(3) Matters arising with reference to the unauthorized practice of law;

(4) The discipline, removal and retirement of justices and judges of the State of Indiana;

(5) Supervision of the exercise of jurisdiction by the other courts of the State, including the issuance of writs of mandate and prohibition;

(6) Issuance of writs necessary or appropriate in aid of its jurisdiction;

(7) Appeals in criminal cases from judgments (sentences) imposing a sentence of death, life imprisonment or a minimum sentence of greater than ten [10] years. If the appeal is from the denial of post-conviction relief, jurisdiction shall be determined by reference to the sentence originally imposed;

(8) Appealable cases where a state or federal statute has been declared unconstitutional in whole or in part;

(9) Appeal from the denial of release in habeas corpus cases arising out of criminal, extradition, or mental health proceedings;

(10) When an appeal is filed in the office of the clerk, in the Court of Appeals, appellant or appellee may petition the Supreme Court to transfer such an appeal to the Supreme Court upon a showing, under oath, that the appeal involves a substantial question of

law of great public importance and that an emergency exists for a speedy determination. The Supreme Court in its discretion may grant said petition and thereby take jurisdiction of such appeal.

(B) In all other cases, appeals shall be taken to the Court of Appeals, notwithstanding any law, statute or rule providing for direct appeal to the Supreme Court of Indiana. Also, appeal from interlocutory orders shall be taken to the Court of Appeals in the following cases:

(1) For the payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidence of debt, documents or things in action;

(2) For the delivery of the possession of real property or the sale thereof;

(3) Granting, or refusing to grant, or dissolving or overruling motions to dissolve preliminary injunctions; or the appointment of receivers;

(4) Orders and judgments upon writs of habeas corpus not otherwise authorized to be taken directly to the Supreme Court;

(5) Any other interlocutory order, if the trial court certifies and the court on appeal or a judge thereof finds on petition that:

(a) The appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination thereof is withheld until after judgment, or

(b) The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case, or

(c) The remedy by appeal after judgment is otherwise inadequate. The petition for an appeal under subsection (5) of subdivision (B) of this rule shall not stay proceedings in the trial court unless the trial court judge or the court on appeal or a judge thereof shall so order, and such order may be made conditional upon the furnishing of a bond or security protecting the appellee against loss incurred thereby, if any.

Any law, statute or rule or part thereof in conflict with the provisions set forth hereinabove are superseded by these rules, and the portions in conflict with these rules are hereby held vacated, set aside and held for naught.

* * *

RULES OF PROCEDURE FOR ORIGINAL ACTIONS INCLUDING WRITS OF MANDATE AND PROHIBITION

(A) Original actions viewed with disfavor. Original actions for writs are viewed with disfavor. Counsel will not be allowed to use such writs as a vehicle for circumventing the normal appellate process. Writs will be granted only when a denial would result in extreme hardship.

(B) Applications for writs. In order that applications for temporary writs will not be made at irregular hours, thus interfering with the court's previously scheduled business and routine, applications for such writs shall be made pursuant to the following provisions:

(1) Except in cases involving a change of venue, no petition for a writ of prohibition will be entertained until the relator has first attacked the want or excess

of jurisdiction of the trial court by a written motion, brought to the attention of the judge of the trial court, and such motion has been denied or not promptly acted upon. Except in cases involving a change of venue, no petition for an alternative writ of mandamus will be entertained unless it be shown that the duty to act has been presented or brought to the attention of the judge of the trial court.

(2) Except in cases in which an extreme emergency is demonstrated by an affidavit setting forth detailed facts, petitions for temporary and alternative writs will be considered only on Monday of each week at 2:00 P.M. Affidavits seeking an emergency hearing must be presented to the chief justice, if available, or to the next ranking member of the court available, for a determination as to whether or not a sufficient emergency exists to hear the matter before the next Monday.

(3) Every petition for a writ shall be first presented to the court administrator who shall examine the petition for the proper form, note thereon the time of presentation, and fix the Monday at which the petition will be heard. The date of hearing shall not be less than one [1] week from the date of filing. It is the duty of petitioning counsel to promptly notify opposing counsel of the time and date of the hearing. The office of the court administrator is located in Room 312, State House, Indianapolis, Indiana, 46204. Telephone: (317) 633-4112.

(C) Form of the petition. Petitions for writs of mandamus and prohibition out of the Supreme Court and Appellate Court shall be verified and filed with an original and six [6] copies, together with such additional copies as may be necessary for service on

the respondent and on the opposing party or attorney in the case giving rise to the writ. If the relief sought relates to a proceeding in an inferior court, certified copies of all pleadings, orders and entries pertaining to the subject-matter should be set out in the petition or made exhibits thereto. Provided, however, if such certified copies are made exhibits to the petition, it will be sufficient to file one [1] set of copies with the original petition and such additional sets as may be necessary for service on the respondent and on the opposing party or attorney in the case giving rise to the writ. Petitions shall be accompanied by at least six [6] copies of the appropriate form of the temporary or alternative writ to which the petitioner deems himself to be entitled, which writ shall command the respondent to show cause on or before a day to be fixed by the court why the writ should not be made permanent or absolute.

At the time of the service of the temporary or alternative writ and at the time of the service of notice (where no writ is issued), a copy of the petition, with all exhibits and any brief filed in support therefor, shall be served on the respondent and on the opposing party or attorney in the case giving rise to the writ.

(D) Returns and answers to orginal actions. Within the time allowed, the respondent may file an original and six [6] copies of a verified return showing any reason in law or in fact why the writ should not be obeyed. No other pleading on behalf of a respondent will be entertained.

(E) Briefs—Mandate, prohibition and other original actions. In support of their pleadings the parties should file six [6] copies of all briefs.

(F) Oral arguments—Mandate and prohibi-

tion. Oral arguments will be heard only when ordered by the court.

(G) Parties bound—Mandate and prohibition. When a temporary writ has been issued and served the parties will be charged with notice of the subsequent proceedings.

TRIAL COURT PROCEEDINGS

[Information Against Petitioner R. p. 2-4]

THE STATE OF INDIANA	)	In the Criminal Court of Marion County
vs.	)	1978
WALTER RAYMOND WHITE	)	Information for
	)	COUNT I—MURDER
.....	)	IC 35-42-1-1(1)
.....	)	COUNT II—MURDER
.....	)	IC 35-42-1-1(1)

BE IT REMEMBERED, That, on this day before me, JAMES F. KELLEY Prosecuting Attorney of the Nineteenth Judicial Circuit, personally came JAMES PARNELL who, being duly sworn, upon his oath says that WALTER RAYMOND WHITE on or about the 29th day of DECEMBER, A.D. 1977, at and in the County of Marion in the State of Indiana, COUNT ONE: did lawfully and knowingly kill CONNIE SUE MANY by shooting at and against the body of the said CONNIE SUE MANY with a certain gun, to-wit: a shotgun, loaded with gunpowder and metal pellets, held in the hand of the said WALTER RAYMOND WHITE, and did thereby inflict mortal wounds in and upon the body of CONNIE SUE MANY, causing her to die, all of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

/s/ JAMES PARNELL

COUNT TWO:

The affiant aforesaid, upon his oath aforesaid, further says that WALTER RAYMOND WHITE, on or about the 29th day of DECEMBER, A.D., 1977, at and in the County of Marion, and the State of Indiana did unlawfully and knowingly kill LAZALIA STACK by shooting at and against the body of the said

LAZALIA STACK with a certain gun, to-wit: a shotgun, loaded with gunpowder and metal pellets, held in the hand of the said WALTER RAYMOND WHITE, and did thereby inflict mortal wounds in and upon the body of LAZALIA STACK, causing her to die, all of which is... contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

/s/ JAMES PARNELL
Subscribed and sworn to before me, this 7th day of JANUARY, A.D. 1978.

/s/ JAMES F. KELLEY
Prosecuting Attorney
Nineteenth Judicial Circuit

ROBERT FRONZ
Deputy Prosecuting Attorney
Nineteenth Judicial Circuit.

CAPIAS ISSUED TO SHERIFF, BOND $ NO BOND 1978

Comes now the Court, by the Master Commissioner thereof, and hearing having been had upon the issue of probable cause, and the Master Commissioner having examined the affidavits herein pertaining to the existence of probable cause for the issuance of a Capias now finds that____probable cause exists for the issuance of a Capias (warrant for arrest) in this cause, and orders clerk to issue Capias and to set bond in accordance with the bond schedule July adopted by the Court.

/s/ JAY B. HAGGERTY
Master Commissioner
Criminal Court of
Marion County

No. CR78-28C

THE STATE OF INDIANA
vs.
WALTER RAYMOND WHITE W/M/26
615 N. Tacoma

INFORMATION
COUNT I—MURDER I.C. 35-42-1-1(1)
CLASS A FELONY
COUNT II—MURDER I.C. 35-42-1-1(1)
CLASS A FELONY

State's Witnesses
DET. JAMES I. PARNELL, IPD
RHONDA SMITH, 950 N. Parker
SGT. ROBERT HOKE, IPD
EDWARD ANTHONY SMITH, 950 N. Parker
SGT. JACK OHRBERG, IPD
MILTON LAMAR SMITH, 950 N. Parker
DET. P. KOSS, IPD
SARA LEE HAWK, 946 N. Parker
OFF. LANGDON, IPD
CAROLYN HOOPINGARNOR, 956 N. Parker
OFF. REDUS, IPD
JACK WATERS, 2822 E. 19th St.
TIMOTHY LEE COOK, 11114 Monroe Ct.
DR. AGULAR, Wishard Hopsital
DONALD O'BRIEN, IPD
ROBERT EUGENE ROOF, 2519 S. Roena

Filed JANUARY 12, 1978
THOMAS P. O'BRIEN, Clerk
Approved by me,
JAMES F. KELLEY
Prosecuting Attorney
Nineteenth Judicial Circuit

[Excerpts from the proceedings March 12, 1979 R. p. 90]

And afterwards towit on Monday, March 12th, 1979 being the 1979 Term of said Court, before the Honorable Charles C. Dougherty Judge thereof, the following further proceedings were had herein towit:

Comes the State of Indiana by Barbara Ressler and Robert Thomas, deputy prosecutors, defendant White in person and by counsel Robert Hollingsworth, and comes members of the regular panel duly ordered. Court now gives oath to all prospective jurors to true answers give to such questions asked them concerningg their qualifications to serve as members of the Petit Jury, in this cause. Twelve prospective jurors being in the jury box, State examines jurors and passes jurors, Defendant examines jurors and passes jurors, State examines jurors and passes jurors, Defendant examines jurors and passes juror State examines jurors and passes jurors, Defendant examines jurors and passes jurors, The 45 minute limit per side for voir dior having been exhausted by the State, State passes jurors. Defendant examines jurors and passes jurors, the 45 miniute limit per side for voir dior having been exhausted by the State, State passes jurors. Defendant examines jurors and passes jurors the 45 minute limit per side for voir dior having been exhausted by the State, State accepts the Jury, Defendant accepts the Jury, and the Jury consisting of the following are duly sworn as jurors in this cause—1. Robert G. Pressler, 2. Paul T. Stamm, 3. Nellie G. Herron, 4. James K. Weir, 5. Dorothy M. Williams, 6. Mattie J. Powell, 7. Pamela J. Wrege, 8. Thelma Sanburn, 9. Jonie A. Hartley, 10. Robert R. Deakin, 11. Olive T. Hanna, 12. Robert W. Everman,...

[Court Reporter's Certificate of Witnesses appearing at trial R. p. 163-64]

I, Judith T. Hatfield, an Official Reporter of the MARION SUPERIOR COURT, CRIMINAL DIVISION THREE, do hereby certify that the following list of witnesses appeared in the partial trial of Walter Raymond White, on March the 12th, 13th, and 14th, 1979 in the above entitled cause of action, and, in the listed order of appearance:

MARCH 12th, 1979.

1. James Parnell
2. Robert Roof
3. Timothy Cook
4. Rhonda Smith
5. Milton Smith
6. Sara Hawk
7. Bruce Whitlock
8. Jack Ohrberg
9. James Parnell (Witness in hearing out of presence of the Jury.

MARCH 13th, 1979.

10. James Parnell
11. Paul Daniel Koss
12. Josefino Aguilar

MARCH 14th, 1979.

13. Josefino Aguilar (recalled for Re-direct examination).

Dr. Aguilar last witness called in this partial and, incomplete trial of this cause.

Said witness list true and, accurate according to my log and, minutes of this trial, and, as recorded.

/s/ JUDITH T. HATFIELD
Official Reporter
Marion Superior Court
Criminal Division Three

WITNESS my hand and, seal this 2nd day of April, 1979.

[Transcript of the trial proceedings on March 14, 1979 R. p. 216-31]

MARCH THE 14th, 1979. THIRD DAY OF TRIAL OF THIS CAUSE.

COURT MET PURSUANT TO ADJOURNMENT, AND, THE FOLLOWING PROCEEDINGS TOOK PLACE:

COURT OPENED ON THIS, THE THIRD DAY OF TRIAL OF THIS CAUSE

ALL PARTIES PRESENT, JURY ENTERS OPEN COURT

STATE CALLS WITNESS JOSEFINO AGUILAR TO STAND FOR REDIRECT EXAMINATION:

RE-DIRECT EXAMINATION:

QUESTIONS BY MS. RESSLER:

Q. Sir, would you state your name, again, for the record, please?

A. The name is Josefino, spelled, Josefino, middle initial, C., last name is, Aguilar, spelled, Aguilar.

Q. Are you the same Dr. Aguilar, who testified previously in this cause?

A. Yes, I am.

Q. Dr., do you have your report here with you, today?

A. Unfortunately, no.

Q. I'll hand you this particular report marked, 771374, and, ask you if you can identify that?

A. Yes, I can.

Q. What is it?

A. This is my protocol signed by me, January the 4th, 1978.

Q. In regards to?

A. In regards to the autopsy that I have performed on Constance Many.

Q. Then handing you the report marked, 771375, could you, again, see if you can identify that, also?

A. Yes, I could.

Q. What is it?

A. It is my autopsy protocol, a copy of my autopsy protocol, done on Miss Lazalia Stack.

Q. Were both of those performed then, on the date of December the 30th, 1977?

A. Yes.

Ms. Ressler: Judge, at this time the State would offer into evidence, what has been identified by Dr. Aguilar, as State's exhibit, 42 and, State's exhibit, 43.

Court: Any objection?

Mr. Hollingsworth: No objection, Your Honor.

RE-DIRECT EXAMINATION RESUMES:

QUESTIONS BY MS. RESSLER:

Q. Dr. Aguilar, during the course of your testimony, yesterday, there were several points during the examination that you refused to answer as an expert witness, is that correct?

A. That's right.

Q. Would you explain, at this time, your reasons for doing so?

Court: Let me ask a question here.

COURT QUESTIONS ASKED OF WITNESS AGUILAR:

Q. Now, as far as Lazalia Stack is concerned, would you have an opinion as to her cause of death?

A. Yes, Judge.

Q. What is that opinion?

A. That she died of a wound on her head.

Q. As a result of what?

A. Judge, I refuse to answer that, I respectfully do so.

Q. If you refuse to answer the question_____.

A. _____Judge_____.

Q. _____are you a Deputy Coroner?

A. Yes, I am, Your Honor.

A. As such a Public Official?

A. Yes_____.

Q. Yet you refused four times yesterday to answer a question.

A. Yes, Your Honor.
Q. Why do you refuse to answer the questions?
A. Could I explain myself, Your Honor?
Q. Just, why do you refuse to?
A. Because I am not here as an expert witness.
Q. But, you are an expert, you're a doctor, licensed to practice medicine in the State of Indiana, you're a Deputy Coronor____.
A. ____yeah, I'm answering the question____.
Q. You have testified in many, many of these cases____.
A. ____I'm answering____.
Q. ____so, the Court has decreed that you are an expert witness.
A. I'm answering the questions as a doctor, Your Honor, and, I'm also answering as a Deputy Coroner, which I really am not a Deputy Coroner, in this particular case. I'm answering it as a doctor, identifying a wound.
Q. Let's put it this way, the Court is ordering you to answer the question.
A. (Witness does not respond).
Q. Do you refuse to answer the question, yes, or no?
A. (Witness does not respond)

Court: Let the record show that the doctor refuses to answer the question, and, that he refused to answer similar questions as the record will disclose, on four occasions on Tuesday, the 13th, which was yesterday, and, the Court now finds the doctor in Direct Contempt of Court for refusing to answer

questions, although he is duly licensed to practice medicine, and, is a Deputy Coroner, and, the Court has ordered him to answer the questions, so, we find you in Direct Contempt of Court, Dr. Aguilar.

COURT QUESTIONS OF WITNESS AGUILAR RESUME:

Q. At this time, you have an opportunity to purge yourself, either by answering the questions, giving your reason for not answering the question, or presenting whatever you might desire in defense of your position.
A. I am responding to the questions being brought to me since yesterday, Tuesday, as an expert witness, being a physician, or doctor. The State of Indiana, the State of Indiana, according to the Act for the Coroner, whatever the right terminology is, states that in the practice of Pathology, not Forensic Pathology, but, Pathology proper, and, I am responding to the questions as a Pathologist. A Pathologist recognize wounds, a Pathologist recognize injury, but a Pathologist does not identify weapons or material that causes injury. That is beyond, beyond being a Pathologist, what the Court is asking me to do, is being an expert witness, and, that is being a Forensic Pathologist. I am responding to the Court, a Deputy Coroner, himself, per se, does not make an opinion as to the material or the object causes the injury, he just describes injuries. In this particular case I was asked by the Coroner to perform an autopsy on a Constance Many, and, a Lazalia Stack, perform an autopsy, which I did, and, the Coroner requested me to do this autopsy

to find out what the cause of death is, and, the cause of death is a wound for Miss Lazalia Stack a wound on her chest, is the cause of death, of Miss Lazalia Stack, the would on her chest resulting in massive hemmorhage, inside her chest, that's____her cause of death. On Miss Constance Many, the cause of death as ordered by the Coroner for me to find out, is a wound to the head, resulting in destruction of the brain, and, I have responded to that as a doctor, as a Board Certified Pathologist, I responded to it, but, beyond that, is making me an expert witness, of another kind, which is a Forensic Pathologist. I think, Your Honor, I have responded to these questions properly, and, I have just been subpoenaed here as a factual witness to the case.

Q. But, you are a medical doctor, licensed to practice medicine in the State of Indiana, isn't that right?

A. Judge____.

Q. Yes or no?

A. Yes, I am.

Q. And, the State of Indiana only issues one type of license to a medical doctor, isn't that right?

A. Yes, Your Honor.

Q. Allright, go ahead.

A. Doctors cannot even identify what a wound is, they don't even know—let me give an example. A doctor, any doctor, cannot identify what laceration is, versus what an incised wound is, to them both wounds are cuts, cuts, or sometimes they're interchangeable items.

Q. Well, the truth of the matter is, the reason you refuse to testify is, you don't feel that you being paid enough isn't that right?

A. No, Your Honor, I beg your pardon, that is not my reason for not testifying, that is not my reason at all.

Q. What is your reason for refusing to testify?

A. My reason not to testify as an expert witness from hereon in, is this. The Prosecutor's Office, time and, time again, refuse to give me, the courtesy that they would give an ordinary expert witness, they refuse to give that to me, I don't understand this.

Q. What courtesy are you talking about?

A. The courtesy of having to ask me whether or not I will be available at such and, such a time, the courtesy to inform me that a case had been discontinued, or a case had been, had gone to trial, and, the person had pleaded guilty, they have refuse to give me this type of courtesy.

Q. What has that got to do with your refusing to testify in Court, though?

A. Well, Your Honor, when I come to Court since 1975, I have been doing this, I have been coming to Court as a factual witness, but, as a form of courtesy I extended the Prosecutor's Office my expertise on the subject, which was never being given credit—I didn't have to do that, but, I did it as a favor, because I want to do, I think the citizenry of the State of Indiana deserve this sort of thing from me, but, this was, never, you know, nobody give a "damn" about this thing, Your Honor. So, now, I'm just acting on my behalf, as

just a factual witness, which I am, what I am, a factual witness, that's all I am, just a factual witness.

Q. Well, as a result of your refusal to testify four times yesterday, and, as a result of your refusal to testify today, and, the Court having found your explanation inadequate, you're found in Direct Contempt of Court, and, the Court's going to levy a fine of $50.00 and, on top of that, you're given five days in Jail.

Court: Sheriff, will you take the doctor?

DOCTOR AGUILAR LEAVES OPEN COURT ACCOMPANIED BY DEPUTY SHERIFF

Court: This is in the record?

Reporter Hatfield: Yes, sir.

Court: If there is to be any appeal, or contesting the Court's decision the Court has the right to direct the trial of a case. This is a very serious multiple murder proceeding, and, we have been in trial here, we're going into the third day, and, we're not going to permit the ends of justice to be frustrated by Dr. Aguilar who apparently feels that every time he opens his mouth, he's supposed to be paid for it. Now, I understand that the Coroner has a contract with Wishard Hospital whereby the Coroner pays them $80,000.00 to perform autopsies, and, in return they are to provide doctors, and, expert testimony, isn't that right Miss Ressler?

Ms. Ressler: Yes Judge.

Court: And, he is a Deputy Coroner?

Ms. Ressler: He has a duty to the public.

Court: He has a duty to the public, just like we have a duty.

Ms. Ressler: Absolutely.

Court: So, this is in the record, he refused four times yesterday, to testify. It's the first time in my twenty years experience I've heard a doctor refuse to testify, and, there comes a point in proceedings where you've got to draw the line where the Court has to do what is in the best interest of the public. You can't allow a trial of this serious nature to become a circus, just because someone decides that they might or might not testify. As a result of this development in this case, because of the adverse effect it obviously would have on the Jury, and, the fact that it would deprive the State of an important witness, and, reflect on his credibility, the Court, at this time, is going to declare a mistrial in this case, set the submission of the cause aside, and, discharge the Jury, because I don't think that we can proceed fairly further in the matter. I don't think that I have any choice. I have never in a murder case, ever had anything like this to happen, and, for both sides to receive a fair trial, we cannot allow collateral disruptive influences to color the testimony that we've heard. I don't see any alternative, and, that's what I'm going to do at this time, so, we'll show that there has been a mistrial declared on the basis of Dr. Aguilar's performance, and, refusal to testify, and, submission of the cause is set aside, and, the Jury is discharged. We will reset this case for trial in the immediate future, at such time as Counsel for the State

and, the Defendant can confer on it, and, start over again; I don't see any alternative.

Mr. Hollingsworth: Well, for the purposes of the record, we don't concur in it, in_____.

Court: Well, I'm not asking either one of you whether you concur or not, that's_____so, you can take the Jury out. Again, I want to thank you for your service; I'm sorry this terminated this way, but, I don't think the Court can tolerate a witness who refuses to testify under Court order, particularly a doctor who is a professional man, and, licensed to practice medicine. I don't think I had any alternative, because it reflects adversely on the State's witness, and, I would do the same thing if it were to happen as far as the Defense is concerned. It's the first time in twenty years I've ever been confronted with anything like this. I have had Dr. Aguilar testify in other cases in this Court isn't that correct?

Reporter Hatfield: Yes, sir.

Court: Many of them, and, given his expert opinion, and, yesterday when he refused to testify, I was quite shocked by the fact that he refused to testify, couldn't believe it, so, I think this is the only remedy, is to find him Guilty of Direct Contempt, levy a fine, and, proceed according to Statute, so again, I'm sorry. We'll try again next time.

JURY NOW DISCHARGED FROM THIS CAUSE

AND, THAT WAS ALL THAT WAS HEARD ON THIS DATE IN THIS CAUSE.

[R. p. 109]

MOTION TO DISMISS
AND
FOR DISCHARGE OF DEFENDANT

Defendant, Walter Raymond White, by counsel, moves the Court to dismiss the information charging him in this cause on the following grounds:

1. That prosecution is barred by reason of a previous prosecution.

WHEREFORE, defendant moves the Court to grant this Motion to Dismiss and order the discharge of the defendant forthwith.

/s/ ROBERT D. HOLLINGSWORTH
Attorney for Defendant,
Walter Raymond White

[R. p. 110]

AFFIDAVIT IN SUPPORT OF
MOTION TO DISMISS
AND
FOR DISCHARGE OF DEFENDANT

Robert D. Hollingsworth, counsel for the defendant, Walter Raymond White, under oath in support of defendant's Motion to Dismiss and for Discharge deposes and says as follows:

1. That on March 12, 1979, a jury was impaneled and sworn, and the above-captioned cause was submitted to such jury.

2. Witnesses were sworn, testimony was heard and evidence was offered and received.

3. The submission of the cause was withdrawn from the jury on March 14, 1979, after the Court sua sponte declared a mistrial.

4. The defendant did not consent to such termination of his trial.

5. That there was no compelling reason nor legal necessity for the mistrial.

/s/ ROBERT D. HOLLINGSWORTH
Attorney for Defendant,
Walter Raymond White

[Trial Court's Order of April 6, 1979 R. p. 161]

And afterwards towit on Friday, April 6th, 1979 being the 1979 Term of said Court, before the Honorable Charles C. Dougherty Judge thereof, the following further proceedings were had herein towit:

State by Barbara Ressler deputy prosecutor, defendant White in person and by counsel R. Hollingsworth, Submitted to Court for Hearing on Motion to Dismiss and for Discharge of Defendant. Hearing had: Argument heard. Court now denies defendant's Motion to Dismiss and for Discharge of Defendant. Court now vacates pre-trial conference date of May 9th, 1979 at 9:00 A.M. Parties are to be reads for trial on May 21st, 1979 at 9:00.

[R. p. 272]

MOTION FOR CERTIFICATION
PURSUANT TO A.P. 4(B) (5)

Comes now the defendant, Walter Raymond White, by counsel, Robert D. Hollingsworth, and says:

1. That the defendant will suffer substantial expense, damage and injury if the April 6th, 1979, Order of this Court denying defendant's March 15, 1979, "Motion to Dismiss and for Discharge of Defendant" is erroneous and the determination thereof is withheld until after judgment.

2. That this Court's April 6, 1979, Order denying defendant's March 15, 1979, "Motion to Dismiss and for Discharge of Defendant" involves a substantial question of law, the early determination of which will promote a more orderly disposition of this case.

3. That the remedy by appeal, of the Court's denial of such Motion, after judgment, is inadequate, because the defendant would be forced to endure a second trial, with the risk of conviction, the very evil against which the double jeopardy rule provides protection.

WHEREFORE, defendant moves the Court to certify that the foregoing are the circumstances in this cause.

/s/ ROBERT D. HOLLINGSWORTH
Attorney for Defendant

[Trial Court's Order of May 2, 1979 R. p. 273]

And afterwards towit on Wednesday, May 2nd, 1979 being the 1979 Term of said Court, before the Honorable Charles C. Daugherty Judge thereof, the following further proceedings were had herein towit:

Motion for stay of proceedings pending interlocutory appeal is denied. Motion For Certification Pursuant To A. P. 4 (B) (5) is denied.

INDIANA SUPREME COURT PROCEEDINGS
[R. p. 235]

IN THE
SUPREME COURT OF INDIANA

"Filed
Marjorie O'Laughlin
May 2, 1979
Clerk of the
Indiana Supreme and
Court of Appeals"

STATE OF INDIANA, EX. REL. WALTER RAYMOND WHITE, *Relator,*	)	
vs.	)	
THE MARION SUPERIOR COURT, CRIMINAL DIVISION, NUMBER 3, and the HONORABLE JUDGE CHARLES C. DAUGHERTY, *Respondents.*	)	CAUSE NO. 579 S 119

VERIFIED PETITION FOR
WRIT OF MANDATE AND
WRIT OF PROHIBITION

Comes now the relator, Walter Raymond White, and shows the Court:

1. That the Respondent, Judge Charles C. Daugherty, is the duly elected, qualified and acting regular Judge in this cause in the Marion Superior Court, Criminal Division, Number 3, of the State of

Indiana, and at all times mentioned herein was the sole and only regular Judge of this cause in said Court.

2. That this Court has jurisdiction to issue a Writ of Mandate against the Respondents herein, mandating the granting of the "Motion to Dismiss and for Discharge of Defendant", Relator, in the cause of State of Indiana vs. Walter Raymond White, in the Marion Superior Court, Criminal Division, Number 3, Cause No. CR78-028C (Tr. P 108-117), together with the Memorandum and Affidavit in support thereof; that this Court also has jurisdiction to issue a Writ of Prohibition against the Respondents herein, prohibiting the Respondents from proceeding further with the second trial of said cause.

3. That the proceedings in the lower Court are entitled State of Indiana vs. Walter Raymond White, Marion Superior Court, Criminal Division, Number 3, Cause No. CR78-028C, which was an action brought by the State of Indiana, Marion County Prosecutor, James F. Kelley, charging the Relator by information with two counts of murder (Tr. P 2-3).

4. That on March 12, 1979, a jury was impaneled and sworn by the Marion Superior Court, Criminal Division, Number 3, the Honorable Charles C. Daugherty, Judge presiding, and the cause of State of Indiana vs. Walter Raymond White, Cause Number CR78-028C, was submitted to such jury (Tr. P 90 & 91). Thirteen witnesses were sworn and thereafter testified and evidence was offered and received (Tr. P 163 & 164). The submission of the cause was withdrawn from the jury on March 14, 1979, on the third day of trial after the Court *sua sponte* declared a mistrial (Tr. 106 & 228), after a witness called by the State, Josefino C. Aguilar, M.D., failed to answer to the satisfaction of the Court a question propounded

originally by the Court (Tr. P 202) and again by the Court (Tr. P 218-220), all in the presence of the jury. The Defendant did not consent to such termination of his trial (Tr. P 229). The Court stated that its reason for declaring the mistrial was that the matter "would deprive the State of an important witness, and reflect on his credibility" (Tr. P 228). This was not a compelling reason nor legal necessity for mistrial.

5. That on March 15, 1979, the Defendant filed his "Motion to Dismiss and for Discharge of Defendant,", "Memorandum in Support of Motion to Dismiss and for Discharge of Defendant,", and "Affidavit in Support of Motion to Dismiss and for Discharge of Defendant" (Tr. P 108-117).

6. That the lower Court has not only a constitutional duty, but also a statutory duty to grant the Relator's "Motion to Dismiss and for Discharge of Defendant" as provided by Indiana Code 35-41-4-3, for the reason that prosecution is barred by reason for a former prosecution.

7. That on April 6, 1979, the lower Court refused to perform that statutory duty, by denying such Motion (Tr. P 161).

8. That the Defendant is now and has been incarcerated without bail in the Marion County jail since December 29, 1977; that the Marion County Prosecutor has scheduled a deposition of J. E. Kooiker, M.D. to be taken May 2, 1979; that the lower Court has set the cause for trial on May 21, 1979 (Tr. P. 106). That Walter Raymond White has a clear, existing statutory right to dismissal of the information and for discharge forthwith and no adequate remedy at law; for all of these reasons an extreme emergency exists and the Relator has sufficient legal interest in this matter for

this Court to grant his Petition for Writ of Mandate and Writ of Prohibition.

WHEREFORE, the Relator prays this Court that a Writ of Mandate be issued against the Respondents herein, mandating that the Respondents dismiss the information filed against the Relator in the Marion Superior Court, Criminal Division, Number 3, Cause Number CR 78-028C, and to discharge the Relator forthwith, for a Writ of Prohibition, prohibiting the Respondents from proceeding with the second trial of Relator, and for an order to show cause on or before a date to be fixed by this Court why such Writs should not be made permanent and for all other proper relief in the premises.

/s/ ROBERT D. HOLLINGSWORTH
Attorney for Relator

VERIFICATION

I, Walter Raymond White, being duly sworn upon my oath deposes and says under penalty for perjury that the allegations contained in the foregoing Petition are true.

/s/ WALTER RAYMOND WHITE

Supreme Court, U.S.
FILED
OCT 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-493

WALTER RAYMOND WHITE,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

STATE OF INDIANA, *Ex Rel.*
WALTER RAYMOND WHITE,

Petitioner,

vs.

THE MARION SUPERIOR COURT,
CRIMINAL DIVISION, No. 3, and
THE HONORABLE CHARLES C. DAUGHERTY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

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vs.

THE MARION SUPERIOR COURT,
CRIMINAL DIVISION, No. 3, and
THE HONORABLE CHARLES C. DAUGHERTY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondents, the Marion Superior Court, Criminal Division, No. 3, the Honorable Charles C. Daugherty, and the State of Indiana respectfully pray this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by that Court in Cause No. 579S119, on June 27, 1979.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 391 N.E.2d 596 and may be found in Petitioner's Appendix, page A-1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

In addition to those set forth in the appendix to the petition, the following statutes and rules are involved and are set forth in the appendix to this Brief:

(1) The statute authorizing appeals in criminal cases, Indiana Code 35-1-47-1, compiled in Title 35, Book 1, Burn's Indiana Statutes Annotated, Code Edition (1979 Replacement), pages 169-170.

(2) The rules governing Motion to Correct Errors prior to an appeal, Rule 16, Indiana Rules of Criminal Procedure, compiled in Court Rules, Book 2, Burns Indiana Statutes Annotated, Code Edition, page 628, and Rule 59, Indiana Rules of Trial Procedure, compiled in Court Rules, Book 1. Burns Indiana Statutes Annotated, Code Edition, pages 340-342.

(3) The rules for perfecting an appeal from a final judgment in Indiana, Rules 2 and 3, Indiana Rules of Appellate Procedure, compiled in Court Rules, Book 2, Burns Indiana Annotated Statutes, Code Edition pages 464 and 470, respectively.

STATEMENT OF THE CASE

Petitioner was charged, by information, with two counts of murder. Jury trial commenced and during three days of trial there were ten witnesses called by the State. The

tenth witness was Josefino C. Aguilar, M.D., a deputy coroner who had performed autopsies on the bodies of the two victims. On March 13, 1979, the doctor refused, in the presence of the jury, to answer one question propounded by the State, four questions propounded by the defense, and two questions propounded by the court. (A 6-7)

March 14, 1979 began with the defense motion for a mistrial upon the ground that the court had given the jury preliminary instructions which incorrectly instructed on the burden of proof applicable to the defense of insanity. (R. 100, 101). The motion was overruled, (R. 103), and Dr. Aguilar was called for his testimony on redirect examination. (R. 103, 216, 217). The doctor refused to answer the court's inquiry regarding the cause of a wound on a victim. (Pet. A-23). The refusal to answer was maintained under the court's order to answer. (Pet. A-24). The doctor was found in direct contempt of court, and his attempt to purge himself, alleging lack of sufficient courtesy from the prosecutor's staff, was found to be insufficient. The court imposed a fine of Fifty Dollars ($50.00) and a jail term of five (5) days (Pet. A-28), caused the doctor to be removed from the courtroom, and discharged the jury declaring a mistrial. (Pet. A-23, 29, 30). Defense counsel formulated an objection which was overruled. (Pet. A-30).

The following day, March 15, 1979, Defendant filed a Motion to Dismiss and For Discharge of Defendant together with an Affidavit in support thereof, alleging that further prosecution is barred by the former prosecution ending in mistrial. That motion was overruled on April 6, 1979.

On April 24, 1979, the Supreme Court of Indiana entertained an original action entitled "Verified Petition for

Writ of Mandate and Writ of Prohibition" brought by the Defendant without requiring formal filing, assignment of a cause number, and payment of court costs. The original action sought the issuance of a Writ of Mandate against the Respondents mandating the dismissal of the information filed against Walter Raymond White, his discharge, the prohibition of a second trial, and an order to show cause why such Writs should not be made permanent. (Pet. A 34-37). The Supreme Court of Indiana took the case under advisement, and denied the petition on April 27, 1979. The grounds for denying the petition, that the trial court did not abuse its discretion in declaring a mistrial and that the Petitioner had an appropriate legal remedy of appeal, were announced to the parties without a formally prepared opinion, pursuant to the entertainment of the petition which had not been formally filed.

The Defendant filed, on May 1, 1979, in the trial court, a motion to certify that if the court had erred by denying Defendant's motion to dismiss, that such denial involves a question of law requiring early determination, and that the remedy by appeal is inadequate. The motion for certification was overruled on May 2, 1979.

Also on May 2, 1979, the Verified Petition for Writ of Mandate and Writ of Prohibition was formally filed in the Supreme Court of Indiana. The court denied the application for a permanent writ on June 27, 1979, holding that the trial judge had the discretionary power to declare a mistrial and the remedy of appeal is adequate to challenge such discretionary action. Therefore, the question presented to the court was not a proper subject for an original action.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE OPINION BELOW IS NOT A FINAL DETERMINATION OF THE QUESTION PETITIONER HAS PRESENTED FOR REVIEW

The sole Question Presented For Review in the petition is whether the right against double jeopardy forbids retrial of the defendant after the trial court has declared a mistrial. The Supreme Court of Indiana did not decide that question.

In its opinion (Pet. A 1-A 3) the Supreme Court of Indiana merely held that the question of whether or not the trial court abused its discretion in granting the mistrial is not a proper subject for an original action in Indiana. The opinion reads, in pertinent part, as follows:

> The orderly procedure of the trial should be left to the sound discretion of the court trying the case. *State ex rel. Rooney v. Lake Cir. Ct.* (1957) 236 Ind. 345, 140 N.E.2d 217. The granting or denial of a motion for mistrial falls within this rule and will be reversed only where an abuse of judicial discretion is demonstrated. *Bean v. State* (1978) — Ind. —, 371 N.E.2d 713; *Short v. State* (1968) 250 Ind. 459, 237 N.E.2d 258.
>
> The respondent in the case at bar had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial. The remedy of appeal is adequate to challenge the trial court's discretion in this matter. The question presented is therefore not a proper subject for an original action.

The Indiana Supreme Court clearly did not decide the merits of Petitioner's double jeopardy claim.

Petitioner's reliance on *Harris v. Washington*, 404 U.S. 55 (1971), to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257 is misplaced. In *Harris*, the state's highest court did decide the double jeopardy claim and *held* that the doctrine of collateral estoppel did not bar a second trial of the defendant. After the state's highest court had unequivocally rejected the double jeopardy claim, this Court found there was a final decision pursuant to 28 U.S.C. § 1257(3). The linchpin supporting jurisdiction in *Harris, supra,* is not present in this case. The Supreme Court of Indiana did not reject Petitioner's double jeopardy claim. The opinion below is based solely on Indiana's original action procedures.

This Court has announced and adhered to the principle that before certiorari review of a state court decision is appropriate, a federal question must be properly presented to the state's highest court pursuant to reasonable state procedures. If the state court finds that the question is not properly presented pursuant to its procedures, this court will not review that decision absent a showing that the state court has interposed an unreasonable state procedural rule merely to evade a federal question. *See e.g., Wolfe v. North Carolina,* 364 U.S. 177, 195 (1960); *Parker v. Illinois,* 333 U.S. 571, 575 (1948); *Nickel v. Cole,* 256 U.S. 222, 225 (1921). The state procedural rule involved in the opinion below is neither arbitrary nor unreasonable. It is a fundamental rule that an original action is an inappropriate procedure to seek review of discretionary actions of the trial court. The rule is applied with virtually no exceptions in Indiana.[1]

[1] The opinion below cites *State Ex Rel. Socony Mobil Oil Co. v. Delaware Cir. Ct.,* 245 Ind. 154, 196 N.E.2d 752 (1964), and *State Ex. Rel. Jones v. Smith,* 220 Ind. 645, 46 N.E.2d 199 (1943) for the rule. The principle is firmly entrenched in Indiana and Indiana cases discussing original actions reiterate the rule.

II.

THE DECISION BELOW DOES NOT FORECLOSE STATE COURT REVIEW OF THE DOUBLE JEOPARDY CLAIM

Petitioner seeks to buttress his position that the decision below rejects his double jeopardy claim by asserting that he has "utilized every State procedure to seek review of his double jeopardy claim prior to enduring a second trial." (Pet. p. 14, fn. 2). He also asserts that the Supreme Court of Indiana held "that Petitioner's legal remedy by way of an appeal *after a second trial* is adequate to challenge Petitioner's double jeopardy claims." [Emphasis ours]. (Pet. p. 14, fn. 2). Neither assertion is adequately supported by the record.

The decision of the Supreme Court of Indiana does not state that Petitioner's State appellate remedies are restricted to an appeal from a conviction *after a second trial.* The opinion below states only that an appeal rather than an original action is the proper Indiana procedure for review of Petitioner's double jeopardy claim. The decision does not imply, and Petitioner should not infer, that a reference to "an appeal" in Indiana means only an appeal following conviction after a second trial.

Upon denial of the Motion for Dismissal and For Discharge of Defendant in the trial court, two appellate procedures were available. One is the interlocutory procedure discussed in the petition (Pet. p. 14, fn. 2), and the other is an appeal from the denial as a final judgment adjudicating a collateral issue in the case.[2] Neither of these appellate

[2] Appeals from a final judgment or order in a criminal case are governed by statutes, Burns Ind. Ann. Stat. IC 35-1-47-1, (Code Edition),

procedures was initiated by Petitioner before he sought extraordinary relief by way of an original action in the Supreme Court of Indiana.[3]

Petitioner has relied on *Abney v. United States,* 431 U.S. 651 (1977), throughout these proceedings to support his claim that he has a right to a pre-trial review of the trial court's rejection of his double jeopardy claim. At the same time, he ignores the *Abney* decision insofar as it determines whether there is a final judgment for purposes of an appeal.[4]

(A-2) and by Rules of the Supreme Court of Indiana. A motion to correct errors filed in the trial court is a necessary condition preceding an appeal from a final order. Rule 16, Indiana Rules of Criminal Procedure, and Rule 59, Indiana Rules of Trial Procedure, (A 2-4). Upon denial of that motion to correct errors, the appeal is initiated by filing a *praecipe* for the record of proceedings pursuant to Rule 2, Indiana Rules of Appellate Procedure. (A-5). The appeal is then filed when the record of proceedings is filed with the Clerk of the Supreme Court. Rule 3, Indiana Rules of Appellate Procedure, (A-5).

[3] Petitioner initiated the original action on April 16, 1979 by application to the Administrator of the Supreme Court of Indiana pursuant to Rule 1(B)(3), Indiana Rules of Original Actions. (Pet. p. A12-A13). Under Indiana procedure, the original action is not filed with the Clerk of the Supreme Court until after the action is heard and orally decided. If a temporary writ is denied, an official opinion is issued and published only if a party then files the proceedings with the Clerk of the Indiana Supreme Court. *See,* Bagni, Giddings and Stroud, *Indiana Appellate Procedure,* Ch. 14, (West 1979) for a general description of original action procedures in Indiana.

The original action below was heard on April 14, 1979 and orally denied on April 27, 1979. Petitioner sought an official published opinion by filing the proceedings with the Clerk of the Supreme Court on May 2, 1979. (Pet. p. A34-A37). The record of proceedings transmitted by Petitioner to the Supreme Court of Indiana for the original action does not contain reference to, or copies of, any actions in the trial court after April 16, 1979, the date the original action was commenced. Consequently, neither Petitioner's motions in the trial court subsequent to April 16, 1979, nor the trial court's rulings thereon were before the Supreme Court of Indiana in the original action.

In particular, the Supreme Court of Indiana had no record of Petitioner's Motion for Certification pursuant to A.P. 4(b)(5), (Pet. p. A32-33), and his Motion to Correct Errors (A-1), both filed on May 1, 1979. Likewise, the trial court's actions on those motions were not of record.

The Indiana Supreme Court has not yet had occasion to decide whether Indiana's final judgment statute,[5] in light of *Abney, supra,* includes the denial of a motion to dismiss based upon a double jeopardy claim. However, in an analogous situation involving a pre-trial appeal from an order setting bail, the Supreme Court of Indiana adopted this Court's final decision construction in *Stack v. Boyle* 342 U.S. 1 (1951). In *Bozovichar v. State* 230 Ind. 358, 103 N.E.2d 680 (1952), the court permitted a pre-trial appeal from an order denying bail, stating:

> [A]s above stated, it was held in Stack v. Boyle, supra, that the matter of the reasonableness of bail as fixed by the trial court was appealable under an act giving the right to appeal "from all final decisions of the district courts". Our statute extends to the defendant the right to appeal "from *any judgment* in a criminal action against him." (emphasis supplied) Burns' 1942 Repl. § 9-2301. We can see little, if any, difference between the right to appeal

[4] While petitioner filed in the trial court the Motion to Correct Errors necessary to perfect an appeal from a final judgment on May 1, 1979, (A-1), he has taken no further action to perfect an appeal from the denial of that motion. *See,* fn. 2, describing the Indiana appellate process.

[5] Burns Ind. Ann. Stat. IC 35-1-47-1, (Code Ed.) [A-2].

[6] In both *Stack* v. *Boyle* 342 U.S. 1 (1951) and in *Abney v. United States* 413 U.S. 651 (1977), the rationale supporting pre-trial appellate review is the same. In both cases, the nature of the rights asserted, (right to bail pending trial and the right not to endure a second trial), is such that there is no remedy for a violation of the rights following a conviction on the underlying crime. A court reviewing the issues after conviction could not release the defendant prior to the already consumated trial nor could it then prevent an already consumated second trial. Thus, this Court in *Stack v. Boyle, supra,* and *Abney, supra,* and the Indiana Court in *Bozovichar, infra,* determined that there were final decisions on issues collateral to the issue of guilt or innocence, and appealable pre-trial.

> from "all final decisions" and the right to appeal from "any judgment in a criminal action". We conclude that the judgment under consideration is appealable under Burns' 1942 Repl. § 9-2301. (footnote omitted) 103 N.E.2d 680, 682-683.

Indiana's response to *Stack v. Boyle, supra,* indicates what Indiana's response[7] to *Abney, supra* might be if the question is presented to the Indiana Supreme Court in accordance with well established appellate procedures.

Contrary to his assertion that he has utilized every available state procedure to obtain pre-trial appellate review of his double jeopardy claim, Petitioner has not pursued a direct appeal from what *Abney, supra,* and *Bozovichar, supra,* suggest is a final appealable judgment. Rather than perfect an appeal, Petitioner brought a highly disfavored original action. An original action cannot be used to circumvent the appellate process in Indiana.[8] The opinion below does not foreclose any avenues of appellate review, but merely reiterates the fundamental principle of Indiana law that an appeal, not an original action, is the proper procedure to seek review of a trial court's exercise of its discretion.[9]

---

[7] *Contra, Miller v. State,* 8 Ind. 325 (1856) holding that denial of double jeopardy claim was not a final appealable order. The case, however, was decided long before the 1905 statute governing final appealable orders, long before *Bozovichar v. State, supra* and over one hundred years before *Abney v. United States, supra.*

[8] Rule 1(A), Indiana Rules of Procedure for Original Actions, (Pet. A13-15).

[9] *See,* fn. 1, *supra* and authorities cited therein.

III.

PETITIONER FAILED TO RAISE A FEDERAL QUESTION BELOW

Rule 19(1)(a) of the rules of this Court provides for a writ of certiorari to a state court where that court has decided a federal question not theretofore decided by this Court, or has decided a federal question contrary to applicable decisions of this Court. In the "Verified Petition for Writ of Mandate and Writ of Prohibition" filed in the Supreme Court of Indiana, the denial of which gave rise to the Petition herein, Mr. White did not allege the violation of any federal rights. See Pet. App. A-34 *et seq.* In paragraphs 6 and 7 of that Verified Petition, White stated:

> 6. That the lower Court has not only a constitutional duty, but also a statutory duty to grant the Relator's "Motion to Dismiss and for Discharge of Defendant" as provided by Indiana Code 35-41-4-3, for the reason that prosecution is barred by reason for a former prosecution.
>
> 7. That on April 6, 1979, the lower Court refused to perform that statutory duty, by denying such Motion (Tr. p. 161).

The paragraph 6 reference to a "constitutional duty" had not previously been made in the Verified Petition and did not elaborate as to whether it referred to a federal right or a state right under Article 1, § 14 of the Constitution of Indiana. In addition, the decision of the Indiana Supreme Court was not based on federal law, but was based solely on Indiana law.

Therefore, the respondents would submit that White has not raised any federal question below, and that this Court lacks jurisdiction to grant the Petition for Writ of Certiorari pursuant to Rule 19(1)(a).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Indianapolis, Indiana 46204

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MOTION TO CORRECT ERRORS

Comes now the defendant, Walter Raymond White, by counsel, Robert D. Hollingsworth, and moves the Court to correct the following error which occured in the above cause. On March 15, 1979, the defendant filed his "Motion to Dismiss and for Discharge of Defendant," on the grounds that prosecution is barred by reason of a former prosecution, a copy of which appears in words and figures, to-wit:

(H.I.)

On April 6, 1979, this Court erred by denying such Motion. Wherefore, defendant moves the Court to correct is error by granting the defendant's "Motion to Dismiss and for Discharge of Defendant," and for all other proper relief in the premises.

/s/ Robert D. Hollingsworth
Attorney for Defendant

Official Certified Copy, True and Complete. Bernard J. Gohmann, Clerk of Courts.

/s/ Beverly Stigall
Clerk or Deputy

INDIANA STATUTE

35-1-47-1 [9-2301]. **Appeal by defendant—Decisions and orders reviewed.**—An appeal to the Supreme Court or to the Appellate Court [Court of Appeals], may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein; and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed.

INDIANA RULES OF CRIMINAL PROCEDURE

Criminal Rule 16

MOTION TO CORRECT ERRORS; FILING WITH JUDGE OR CLERK

In all criminal cases the defendant shall have sixty [60] days from the date of sentencing to file motion to correct errors. It shall be deemed sufficient filing of a motion to correct errors within sixty [60] days following the date of sentencing in a cause if said motion is filed with the judge having jurisdiction of the cause, who shall immediately make a docket entry showing the filing thereof, or if said judge is not available for the presentation and the entry of said motion, then said motion to correct errors shall be filed with the clerk of the court in which said cause is pending, in vacation or in term-time, and the clerk shall immediately thereupon note the filing of said motion to correct errors on the court's docket in the cause, and the clerk shall thereafter call said filing of said motion to correct errors to the attention of the judge in the case at the first opportunity. Trial Rule 59 (Motion to Correct Errors) will apply to criminal proceedings insofar as applicable and when not in conflict with any specific rule adopted by this court for the conduct of criminal procedure.

INDIANA RULES OF TRIAL PROCEDURE

Trial Rule 59

MOTION TO CORRECT ERRORS

(A) Motion to correct errors—When granted. The court upon its own motion or the motion of any of the parties for or against all or any of the parties and upon all or part of the issues shall enter an order for the correction of errors occurring prior to the filing thereof, including, without limitation, the following:

(1) denial of a fair trial by any irregularity in the proceedings of the court, jury or prevailing party, or any

order of court, abuse of discretion, misconduct or the jury or prevailing party;

(2) accident or surprise which ordinary prudence could not have guarded against;

(3) excessive or inadequate damages, amount of recovery or other relief;

(4) the verdict or decision is not supported by sufficient evidence upon all necessary elements of a claim or defense, or is contrary to the evidence specifically pointing out the insufficiency or defect;

(5) uncorrected error of law occurring and properly raised in the proceedings or prior to, at or subsequent to the trial;

(6) newly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial;

(7) correction of a judgment subject to correction, alteration, amendment or modification;

(8) the verdict or decision being contrary to law specifically pointing out the insufficiency or defect; or

(9) for any reason allowed by these rules, statute or other law.

(B) Form of motion. A motion to correct error shall state the issues upon which error is claimed, but the issues are not required to be stated under or in the language of the reasons allowed by the set rules, by statute or by other law. The statement of claimed errors shall be specific rather than general, and shall be accompanied by a statement of the facts and grounds upon which the errors are based.

(C) When motion to correct errors must be filed. A motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment.

(D) Motion to correct errors on affidavits—Opposing affidavits, cross-errors and other matters. When a motion to correct errors is based upon evidence outside the record, the cause must be sustained by affidavits showing the truth thereof served with the motion. The opposing party has fifteen [15] days of service of affidavits in which to serve opposing affidavits and fifteen [15] days after service of the motion in which to file cross-errors or in which to assert relevant matters relating to the kind of relief to be granted. The period for filing affidavits may be extended for an additional period not exceeding thirty [30] days for good cause shown or by written stipulation.

(E) Relief granted on motion to correct errors. The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the issues:

(1) grant a new trial;

(2) enter final judgment;

(3) alter, amend, modify or correct judgment;

(4) amend or correct the findings or judgment as provided in Rule 52(B);

(5) in the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) grant any other appropriate relief, or make relief subject to condition; or

(7) in reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a nonadvisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment

upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the finding shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.

(F) Costs in the event new trial ordered. The court in granting new trial, may allow the same at the costs of the party applying therefor, or on the costs abiding the event of the suit, or a portion of the costs, as the justice and equity of the case may require, taking into consideration the causes which may make such new trial necessary.

(G) Motion to correct error a condition to appeal. In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal

only when included in the motion to correct errors filed with the trial court. A motion to correct errors shall not be required in the case of appeals from interlocutory orders, orders appointing or refusing to appoint a receiver, and from orders in proceedings supplemental to execution.

INDIANA RULES OF APPELLATE PROCEDURE

Appellate Rule 2

INITIATION OF THE APPEAL AND NOTICE TO OPPOSING PARTIES

(A) Initiation of the appeal. An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and that said praecipe shall be filed within thirty [30] days after the court's ruling on the motion to correct errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.

(B) Notice to opposing parties. All parties of record in the trial court shall be parties on appeal. Pursuant to the provisions of Appellate Rule 12, all opposing parties shall be served with a copy of all papers filed after the appeal is submitted. The appellate tribunal may order such additional notice to the parties as justice may require.

Appellate Rule 3

SUBMISSION OF THE APPEAL

(A) Submission. Every appeal shall be deemed submitted and the appellate tribunal deemed to have acquired jurisdiction thereof on the date the record of the proceedings is filed with the clerk of the Supreme and Appellate Courts.

(B) Time within which the appeal must be submitted. In all appeals and reviews, except those from interlocutory orders, the record of the proceedings must be filed with the clerk of the Supreme and Appellate Courts within ninety

[90] days from the date of the judgment or the ruling on the motion to correct errors, whichever is later. In appeals and reviews of interlocutory orders the record of the proceedings shall be filed within thirty [30] days of the ruling. However, if the statute under which the appeal or review is taken fixes a shorter time, the time fixed by the statute shall prevail.

TRANSCRIPT OF THE TRIAL PROCEEDINGS ON MARCH 13, 1979 R. 212-214

(Cross Examination of Dr. Aguilar by Defense Counsel)

"A. Exactly, what do you mean by that question?

Q. I mean, did you form an opinion as to what had caused the wound on the body of Constance Many and, Lazalia Stack, that you have described, to a reasonable degree of medical certainty?

A. Well, you are asking me for my expert opinion?

Court: He asked you if you formed an opinion, that requires a yes, or no, answer.

A. Well, ---- .

Court: Just answer, yes, or no.

A. Yes.

Court: All right, ask another question, now.

CROSS EXAMINATION RESUMES:

QUESTIONS BY MR. HOLLINGSWORTH;

Q. What is that opinion?

A. I respectfully refuse to make that opinion." (R. 206)

• • •

"Q. What about the stomach content of Constance Many?

A. 386 miligrams per deciliter.

Q. What does that mean, doctor?

. . .

A. --- I refuse to answer the question, Your Honor.

Mr. Hollingsworth: Will your Honor direct the witness to answer?" (R. 209)

• • •

"Q. Do you have an opinion as to a reasonable degree of medical certainty, as to whether four percent blood alcohol can kill somebody, in and, of itself?

A. Yes.

Q. Can it?

. . .

CROSS EXAMINATION RESUMES:

QUESTIONS BY MR. HOLLINGSWORTH:

Q. You may answer, doctor.

A. I don't want to give any opinion regarding that question.

Q. You don't,

A. I refuse to give an opinion regarding that question." (R. 212, 213)

• • •

"Q. Do you have an opinion to a reasonable degree of medical certainty, as to whether a person's judgment would be affected at .24 blood alcohol?

A. Yes.

Q. What is that opinion?

A. I refuse to answer that question.

Q. Why do you refuse to answer?

A. Because as I said before, I am here as just a factual witness, let an expert witness give you an opinion.

Q. Well, I didn't call you as a witness, and, I don't understand why you won't answer me, you're an expert, you ----.

A. ---- no, I was never qualified as an expert in this case, sir."

(R. 214)

• • •

Supreme Court, U. S.
FILED
NOV 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-493

WALTER RAYMOND WHITE,
Petitioner,
vs.
STATE OF INDIANA,
Respondent.

STATE OF INDIANA, *EX REL.*
WALTER RAYMOND WHITE,
Petitioner,
vs.
THE MARION SUPERIOR COURT, CRIMINAL DIVISION, NO. 3, and THE HONORABLE CHARLES C. DAUGHERTY,
Respondents.

REPLY BRIEF OF PETITIONER WALTER RAYMOND WHITE

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THE HONORABLE CHARLES C.
DAUGHERTY,
Respondents.

REPLY BRIEF OF PETITIONER WALTER RAYMOND WHITE

Respondents have refused to discuss the merits of the question presented for review in their Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Indiana. Instead, Respondents challenge this Court's jurisdiction on certiorari by making three assertions, as follows: (1) the opinion of the Supreme Court of Indiana is not a final determination of Petitioner's pretrial plea of

double jeopardy; (2) Petitioner has a remedy by way of appeal in state court; and (3) Petitioner failed to raise a federal question in the Supreme Court of Indiana. Each contention is patently without merit, and this Court's jurisdiction is properly invoked under 28 U.S.C. §1257(3). Petitioner replies to Respondents' three contentions in inverse order of their presentation by the Respondents.

A. Petitioner Raised His Fifth Amendment Right Against Double Jeopardy in the Supreme Court of Indiana

Respondents challenge the jurisdiction of this Court, contending that Petitioner "has not raised any federal question below." (R. Brief p. 11) This statement is simply not true. In fact, on the face of the opinion of the Supreme Court of Indiana is acknowledgment that the issue of double jeopardy under the United States Constitution had been presented. That part of the opinion is as follows:

> "Relator now requests this Court to order the Marion Superior Court to discharge him on the ground that a retrial would violate the double jeopardy clauses of the United States and Indiana Constitutions and I.C. §35-41-4-3 [Burns 1979]" (Pet. A. p. A-2)

If the "record as a whole shows either expressly or by clear intendment" that the federal claim and the grounds therefor were brought to the attention of the state court with fair precision, then "the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). It is clear on the face of the opinion of the Supreme Court of Indiana that Petitioner raised his Fifth Amendment right against double jeopardy in that court.

B. There Is No Appellate Remedy Available to Petitioner in State Court Prior to Enduring a Second Trial Prohibited by the Double Jeopardy Clause

Respondents challenge this Court's jurisdiction,

contending that Petitioner has state court appellate remedies which would permit him to litigate his double jeopardy claim prior to enduring a second trial. The Indiana Supreme Court held that the "remedy of appeal is adequate to challenge the trial court's discretion" in declaring the mistrial. (Pet. A. p. A-3) Respondents urge that the Indiana Supreme Court did not mean an appeal from a conviction after a second trial, but, rather, must have meant some kind of a state court appeal of Petitioner's double jeopardy claim prior to a second trial.

Respondents do not and cannot deny that an appeal from a conviction after a second trial is inadequate to protect Petitioner's right against double jeopardy. This Court has consistently held that the Double Jeopardy Clause is a guarantee against being twice put to *trial* for the same offense. *Abney v. United States*, 431 U.S. 651, 660-61, 97 S.Ct. 2034, 2041 (1977); *Breed v. Jones*, 421 U.S. 519, 532, 95 S.Ct. 1779, 1787 (1975); *United States v. Wilson*, 420 U.S. 332, 346, 95 S.Ct. 1013, 1023 (1975). Therefore, Respondents argue that Indiana law permits, and the Indiana Supreme Court referred to, an appeal by Petitioner before the second trial occurs. Respondents state that two Indiana appellate procedures were available to Petitioner, as follows: first, an interlocutory appeal under Rule 4(B)(5), Indiana Rules of Appellate Procedure, and, second, an appeal from a final judgment or order under I.C. 35-1-47-1.

Respondents' contention is untenable. The interlocutory appeal process established by Rule 4(B)(5), Indiana Rules of Appellate Procedure, was sought by Petitioner. (Pet. A. p. A-32-33) However, the certification necessary to perfect such an appeal was denied by the trial court on May 2, 1979. (Pet. A. p. A-33) Under the express provisions of Rule 4(B)(5), Indiana Rules of Appellate Procedure (Pet. A. p. A-11-12), and under Indiana case law interpreting that Rule, there is no appealable interlocutory order without both trial court and appellate court certification. *Constanzi v.*

Ryan, 368 N.E.2d 12, 16 (Ind.App. 1977). On May 17, 1979, Petitioner filed in the original action in the Supreme Court of Indiana certified copies of his "Motion For Certification Pursuant to A.P. 4(B)(5)" and the trial court's order denying that motion. (R. p. 271-74) Thus, the Supreme Court of Indiana was aware of the fact that Petitioner had no right to an interlocutory appeal available to him prior to the issuance of the opinion of that court on June 27, 1979.[1] Clearly, this Petitioner sought and was denied that appeal procedure.

The second assertion of Respondents that some pretrial appeal could have been followed is that the denial of the "Motion to Dismiss and for Discharge of Defendant" was a final judgment and appealable as such under I.C. 35-1-47-1. (R. A. p. A-2) Respondents concede that Indiana law does not recognize such an appeal (R. Brief p. 10 n.7), but contend that Petitioner should have attempted such an appeal to create new law in Indiana. Respondents have cited no authority, and Petitioner has found none, that would require a litigant to pursue unauthorized state appellate remedies prior to seeking review by certiorari in this Court.

Moreover, Indiana has held that the denial of a motion for discharge based on double jeopardy grounds is not a final appealable order. *Miller v. State*, 8 Ind. 325 (1856); *Wingo v. State*, 99 Ind. 343 (1884). Respondents admit such but argue that the law might change if retested. The present Indiana law governing appeals in criminal cases is I.C. 35-1-47-1 which provides that a defendant may take an appeal "from any judgment in a criminal action against him..." (R. A. p. A-2) In order to perfect an appeal under the statute, the

[1] Respondents blatently misstate that Petitioner's "Motion for Certification Pursuant to A.P. 4(B)(5)" and the trial court's denial of that motion were not before the Supreme Court of Indiana in the original action. (R. Brief p. 8 n. 3) That motion and the trial court's denial are part of the record in this cause. (R. p. 271-74; Pet. A. p. A-32-33)

defendant must file a motion to correct errors in the trial court as provided by Criminal Rule 16, Indiana Rules of Criminal Procedure. (R. A. p. A-3) Criminal Rule 16 expressly provides that a defendant shall have 60 days "from the date of sentencing" to file a motion to correct errors. These procedures on their face authorize an appeal by a defendant only from a final judgment following conviction and sentencing in a criminal case. It is clear that no such "appeal" as suggested by Respondents exists in Indiana.

The Supreme Court of Indiana, in construing Burns' Ind. Stat. Ann. §9-2301, the predecessor statute to I.C. 35-1-47-1,[2] has consistently held that a "final judgment" which is appealable under the statute exists only where it disposes of *all* of the issues as to the parties and puts an end to the particular case and *all* the issues involved. *Schell v. State*, 245 Ind. 481, 199 N.E.2d 849 (1964); *Desho v. State*, 237 Ind. 308, 145 N.E.2d 429, 430 (1957). The requirements for a final appealable judgment under Burns' Ind. Stat. Ann. §9-2301 were stated by the Supreme Court of Indiana as follows:

> "A final judgment which is appealable has been generally stated to be one which disposes of all the issues as to the parties to the full extent of the power of court to dispose of same and puts an end to the particular case and all the issues involved." *Desho v. State, supra*, 145 N.E.2d at 430.

Moreover, the Indiana Supreme Court has specifically held that the denial of a motion for discharge is not a final judgment under Burns' Ind. Stat. Ann. §9-2301. *Schaaf v. State*, 221 Ind. 563, 49 N.E.2d 539 (1943); *see also, Harshberger v. State*, 234 Ind. 127, 124 N.E.2d 211 (1955).

[2] The provisions of I.C. 35-1-47-1 are identical to Burns' Ind. Stat. Ann. §9-2301. Its provisions were merely recodified under the present Indiana Code.

Respondents' suggestion that Petitioner had a viable appellate remedy under I.C. 35-1-47-1 is contrary to the law of the State of Indiana. Petitioner stated in his Petition for a Writ of Certiorari to the Supreme Court of Indiana that he "has utilized every available State procedure to seek review of his double jeopardy claim prior to enduring a second trial." (Pet. Petition p. 14 n. 2). That was a correct statement of the posture of this case. Petitioner has not pursued and is not required to pursue unavailable state appellate remedies prior to invoking the jurisdiction of this Court under 28 U.S.C. §1257(3).

C. The Indiana Supreme Court Has Finally Rejected Petitioner's Pretrial Plea of Double Jeopardy

Respondents challenge the jurisdiction of this Court, contending that the opinion of the Supreme Court of Indiana is not a final determination of Petitioner's pretrial plea of double jeopardy. Respondents make a two-pronged argument in support of this contention. First, Respondents state that the Supreme Court of Indiana did not decide the merits of Petitioner's double jeopardy claim, holding only that the remedy of appeal was adequate to challenge the trial court's discretion in declaring the mistrial. Secondly, Respondents allege that the opinion of the Supreme Court of Indiana was based on a reasonable state procedural rule applicable to original actions. In support of their contention, Respondents cite three cases, none of which deal with a claim of double jeopardy.

The Supreme Court of Indiana held that the trial court "had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial" and that the "remedy of appeal is adequate to challenge the trial court's discretion in this matter." (Pet. A. p. A-3) Assuming for purposes of argument that the Indiana Supreme Court did not, by this language, decide the merits of Petitioner's double jeopardy claim, and also assuming that this holding was in accordance with state

procedural rules governing original actions, the opinion of the Indiana Supreme Court is nevertheless "final" as to Petitioner because he has no other available recourse under Indiana law prior to enduring a second trial which he submits is barred under the Double Jeopardy Clause. No matter what construction is placed on the opinion of the Supreme Court of Indiana in this case, that opinion is "final" in that it is subject to no further review in any other state tribunal in Indiana, and it effectively terminates Petitioner's pretrial plea of double jeopardy against him. Even in non-double jeopardy cases, this Court has recognized that a judgment is "final" where the petitioner has no way to preserve his constitutional claims in state court. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 516, 94 S.Ct. 407 (1973).

In *Harris v. Washington*, 404 U.S. 55, 56, 92 S.Ct. 183, 184 (1971), this court held as follows:

> "Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the Petitioner, a claim separate and apart from the question whether the Petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. §1257." (Court's emphasis)

Respondents contend that *Harris* has no application to this proceeding because, in that case, the state's highest court "had unequivocally rejected the double jeopardy claim." (R. Brief p. 6) Respondents attempt to distinguish *Harris*, urging that the Indiana Supreme Court did not reach the merits of Petitioner's double jeopardy claim. Respondents' contention ignores the basic jurisprudential fact that not to decide is to decide. Constitutional rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence v. State Tax Commission*, 286 U.S. 276, 282, 52 S.Ct. 556, 558 (1932). In *Turner v. Arkansas*, 407 U.S. 366, 92 S.Ct. 2096 (1972), the petitioner filed multiple appeals to the Arkansas

Supreme Court from the trial court's denials of petitioner's motions to dismiss the indictment on double jeopardy and *res judicata* grounds. On both appeals the Arkansas Supreme Court affirmed the decisions of the trial court, the latter holding being based on the "law of the case." In granting the writ of certiorari and reversing the decision of the Arkansas Supreme Court, this Court held that "the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose our inquiry on this issue." *Turner v. Arkansas, supra*, 407 U.S. at 368, 92 S.Ct. at 2098.

The opinion and judgment of the Indiana Supreme Court in this case has, for all purposes, "finally" rejected Petitioner's pretrial plea of former jeopardy. He has no recourse available in state court prior to enduring a second trial and possible conviction. Accordingly, this Court's jurisdiction is properly invoked under 28 U.S.C. §1257(3). *Harris v. Washington, supra; Turner v. Arkansas, supra; Abney v. United States, supra.*

Respondents' challenge to the jurisdiction of this Court represents an attempt to obfuscate Petitioner's Fifth Amendment right against double jeopardy which is properly before this Court on certiorari. Petitioner respectfully submits that this Court has jurisdiction to hear this cause under 28 U.S.C. §1257(3) and that certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-493

WALTER RAYMOND WHITE, *Petitioner,* vs. STATE OF INDIANA, *Respondent.*	)
STATE OF INDIANA, *EX REL.* WALTER RAYMOND WHITE, *Petitioner,* vs. THE MARION SUPERIOR COURT, CRIMINAL DIVISION, NO. 3, and THE HONORABLE CHARLES C. DAUGHERTY, *Respondents.*	)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Petitioner, Walter Raymond White, has been personally served upon the following counsel, pursuant to Rule 33(1), (3)(b), Revised Rules, Supreme Court of the United States, by hand-delivering three (3) copies of the same to each counsel at their offices:

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